Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

ROSEANN H. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of February, two thousand and four.

Docket No.
02-9104

UNITED STATES COURT OF APPEALS
FILED FEB -9 2004
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

BRIDGEWATER OPERATING CORPORATION and ULYSSES I & COMPANY, INC.,

Plaintiffs-Counter-Defendants-Appellants,

STEVEN M. CHERNIAK & CHARLES MINCH,

Plaintiffs,

v.

GARY FELDSTEIN, STROOCK & STROOCK & LAVAN LLP., KEVIN SMITH, JOAN TAVERNI, DECTEN FUND, L.P., ANDREA BENKO, MARA GIBBS, ERROL MARGOLIN, EDWARD P. ROMAINE, PATRICK AUBE, RICHARD SCHNEIDER, KENNETH BROWN, GERARD LARSEN,

Defendants-Appellees,

PETER MORTON,

Defendant-Counter-Claimant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Ulysses I & Company, Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
by:

/s/ Laura Bass Penn
Laura Bass Penn
Motions Staff Attorney

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: September 9, 2003 Decided: October 2, 2003)

Docket No. 02-9104

BRIDGEWATER OPERATING CORPORATION and ULYSSES I & COMPANY, INC.,

Plaintiffs-Counter-Defendants-Appellants,

STEVEN M. CHERNIAK and CHARLES MINCH,

Plaintiffs,

v.

GARY FELDSTEIN, STROOCK & STROOCK & LAVAN LLP, KEVIN SMITH, JOAN TAVERNI, DECTEN FUND, L.P., ANDREA BENKO, MARA GIBBS, ERROL MARGOLIN, EDWARD P. ROMAINE, PATRICK AUBE, RICHARD SCHNEIDER, KENNETH BROWN, GERARD LARSEN,

Defendants-Appellees,

PETER MORTON,

Defendant-Counter-Claimant-Appellee.

Before: McLAUGHLIN, CABRANES, and B. D. PARKER, JR., *Circuit Judges.*

Appeal from an August 23, 2002 judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, *Judge*) granting defendant Feldstein's motion to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and entering a permanent injunction that requires plaintiffs and their associates (i) to seek the permission of the District Court prior to filing any further federal lawsuits relating to the property at issue in the instant case, and (ii) to append the District Court's opinion and order

of injunction to the first papers filed in any future state-court proceedings that relate to the property.

Affirmed. Double costs awarded.

JEFFREY H. HOWARD, Crowell & Moring, LLP, Washington, D.C. (Marc S. Dreier, Dreier LLP, New York, NY, *on the brief*, Boies, Schiller & Flexner LLP, Armonk, NY, *of counsel), for Plaintiffs-Counter-Defendants-Appellants Bridgewater Operating Corporation and Ulysses I & Company, Inc.*

KEVIN L. SMITH (Heidi Balk, *of counsel)*, Stroock & Stroock & Lavan LLP, New York, NY, *for Defendant-Appellee Gary Feldstein.*

Errol F. Margolin (Philip Pierce, Marshall C. Berger, *of counsel)*, Margolin & Pierce, New York, NY, *for Defendant-Counter-Claimant-Appellee Peter Morton.*

PER CURIAM:

Plaintiffs Bridgewater Operating Corporation ("Bridgewater") and Ulysses I & Company, Inc. ("Ulysses") appeal from an August 23, 2002 judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, *Judge*) granting defendant Feldstein's motion to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and entering a permanent injunction that requires plaintiffs and their associates (i) to seek the permission of the District Court prior to filing any further federal lawsuits relating to the property at issue in the instant case, and (ii) to append the District Court's opinion and order of injunction to the first papers filed in any future state-court proceedings that relate to the property.

BACKGROUND

This is the most recent in a series of lawsuits over the disposition of a parcel of oceanfront property in East Hampton, New York ("the Premises"). Prior to the instant case, disputes over the parties' rights to the Premises have been raised before local, state and federal courts, beginning with an

action initiated by defendant Feldstein in the Supreme Court of the State of New York, Suffolk County (Gerard D'Emilio, *Justice*), in which Feldstein was awarded specific performance of his contract with Jack Rounick to purchase the property. *Feldstein v. Rounick,* No. 20970/1998 (N.Y. Sup.Ct. Suffolk County, Jan. 31, 2000). Justice D'Emilio held that Rounick had breached his purchase and sale agreement with Feldstein by attempting to sell the Premises to Ulysses and its affiliates, including Bridgewater. *Id.* Since that judgment and its affirmance on appeal, *Feldstein v. Rounick,* 276 A.D.2d 523, 714 N.Y.S.2d 689 (2d Dep't 2000), plaintiffs and their affiliates have initiated numerous actions seeking title to the Premises. The various fora in which the plaintiffs have filed suit include the East Hampton Justice Court, the United States District Court for the Eastern District of New York, the United States Bankruptcy Court for the Southern District of Florida, and, in the instant case, the United States District Court for the Southern District of New York. [1]

In the instant case, plaintiffs seek monetary damages for injury resulting from alleged violations by defendant Feldstein under the Racketeer Influenced & Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and from Feldstein's alleged engagement in common law fraud and unjust enrichment. Plaintiffs claim that they are entitled to damages under RICO because income from RICO offenses enabled Feldstein to purchase the Premises.

The District Court dismissed each of plaintiffs' claims, holding that they were barred for lack of subject matter jurisdiction under both the *Rooker-Feldman* doctrine and the doctrine of *res judicata. See Ulysses I & Co., Inc. v. Feldstein,* No. 01 Civ 3102 (LAP), 2002 WL 1813851, at *10, *12 (S.D.N.Y. Aug. 8, 2002). The Court held that the plaintiffs' claims were barred under *Rooker-Feldman* with respect to the original state-court judgment awarding Feldstein title

[1] These prior actions are described in detail in the District Court opinion, *Ulysses I & Co., Inc. v. Feldstein,* No. 01 Civ 3102(LAP), 2002 WL 1813851, at *3-6 (S.D.N.Y. Aug. 8, 2002).

to the Premises. *Id.* at *10 ("Ulysses' federal claims are barred by *Rooker-Feldman* because they are 'inextricably intertwined' with the Suffolk County Judgment."). The Court further held that plaintiffs' claims were equally barred by *res judicata* in light of the earlier federal action they had filed in the United States District Court for the Eastern District of New York. *Id.* at *12. In the earlier federal action, plaintiffs had alleged a series of federal offenses associated with an "unlawful conspiracy" to acquire the Premises, and Judge Hurley of the Eastern District of New York had dismissed the plaintiffs' claims for lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine.[2] *Id.* at *5.

In addition, Judge Preska granted defendant's motion for a permanent injunction against Ulysses and its affiliates, prohibiting them from initiating or intervening in any action in a federal forum "that is in any way, directly or indirectly, connected with or related to the Premises without first obtaining leave of [the District Court] . . . . " Judgment and Order of Permanent Injunction, at 2-3; *Ulysses I & Co.*, 2002 WL 1813851, at *14-16. The injunction further ordered Ulysses to attach a copy of the District Court's opinion and order of injunction to the first filings in any future state proceeding related to the Premises. Judgment and Order of Permanent Injunction, at 2-3; *Ulysses I & Co.*, 2002 WL 1813851, at *14-16.

DISCUSSION

I. *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine provides that, because only the United States Supreme Court may review a final decision of a state court, federal district courts do not have jurisdiction over claims that have already been decided, or that are

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[2] This Court affirmed the judgment of the Eastern District of New York by summary order on April 18, 2001, and the United States Supreme Court denied certiorari. *See Ulysses I & Co., Inc. v. Morton,* 11 Fed. Appx. 14 (2d Cir.), *cert. denied,* 534 U.S. 992 (2001).

"inextricably intertwined" with issues that have already been decided, by a state court. *See Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). We agree with the District Court that it lacked jurisdiction to adjudicate the claims raised in this action because they are "inextricably intertwined" with issues settled by the state court action that originally adjudicated the parties' rights to the property. *See Feldstein*, 276 A.D.2d at 523-24, 714 N.Y.S.2d at 690. Plaintiffs argue that the fact that they are now seeking only monetary damages, rather than possession of the property, renders their claims so distinct from those they raised in the state court that they are not barred by the *Rooker-Feldman* doctrine. However, we agree with the District Court that, regardless of the form of remedy, plaintiffs' RICO charges and related claims "in essence seek damages for losing the Premises to Feldstein, which . . . directly implicate[s] the propriety of the [state court] Judgment." *Ulysses I & Co.*, 2002 WL 1813851, at *10. Accordingly, for substantially the reasons stated by the District Court, we affirm the Court's holding that it lacked subject matter jurisdiction over the plaintiffs' claims under the *Rooker-Feldman* doctrine.[3]

II. Permanent Injunction

Plaintiffs also challenge the District Court's issuance of a permanent injunction prohibiting them and their affiliates from (i) pursuing further federal litigation concerning the Premises without first obtaining the authorization of the District Court, and (ii) pursuing further state litigation with respect to the Premises without appending the District Court's opinion and order of injunction to their first filings.

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[3] Because we affirm the District Court's dismissal of plaintiffs' claims under the *Rooker-Feldman* doctrine, we need not, and do not, reach the plaintiffs' appeal from the District Court's holding on the basis of the doctrine of *res judicata*.

The District Court identified facts demonstrating that plaintiffs possess all five indicators set forth by this Court in *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986), for determining whether a plaintiff should be subject to an injunction against further litigation. *See Ulysses I & Co.*, 2002 WL 1813851, at *13-14. We agree with the District Court that these factors establish that plaintiffs are "likely to continue to abuse the judicial process and harass other parties." *See id.* at *13 (quoting *Safir*, 792 F.2d at 24) (internal quotation marks omitted), *see also, e.g., In re Martin-Trigona*, 737 F.2d 1254, 1261-62 (2d Cir. 1984) (affirming an injunction limiting a litigant's access to the federal courts and imposing a notice requirement on a litigant's access to state courts in light of a record of repetitious litigation). Therefore, for substantially the reasons stated by the District Court, we affirm the District Court's imposition of a permanent injunction requiring plaintiffs (i) to seek authorization from the United States District Court for the Southern District of New York before pursuing further federal litigation with respect to the Premises, and (ii) to inform all state courts in which they file claims regarding the Premises of the Court's judgment and injunction.[4]

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[4] Plaintiffs argue that the District Court lacked the power to enjoin them from filing future lawsuits after the Court found that it lacked subject matter jurisdiction over the substance of their claims pursuant to the *Rooker-Feldman* doctrine. We reject this argument because it is undermined by Supreme Court precedent, *see Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992) (holding that whether an attorney had "abused the judicial process," and whether sanctions were warranted under Rule 11, were appropriately considered after dismissal for lack of subject matter jurisdiction, because such determinations "do[ ] not signify a district court's assessment of the legal merits of the complaint" (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990) (internal quotation marks omitted))); by the law of our Circuit, *see Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 141 (2d Cir. 2002) ("Although the district court lacked jurisdiction to decide the merits of the underlying action, it retained the power to determine collateral issues, such as the appropriateness of sanctions." (citing *Willy*, 503 U.S. at 137-39)); and by statute, *see, e.g.*, 28 U.S.C. § 1919 (providing that "[w]henever any action

III. Rule 38 Sanctions

As a final matter, we consider whether sanctions are warranted in this Court for the filing of the instant appeal. Federal Rule of Appellate Procedure 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Fed. R.App. P. 38. At oral argument on September 9, 2003, this Court served notice that it would consider the imposition of double costs in this matter and asked for letter briefing. Having reviewed the briefs of all parties, we now conclude that the imposition of double costs under Rule 38 is appropriate in light of Ulysses's extensive history of persistent, repetitive and vexatious litigation involving the Premises, and particularly in the light of the frivolous nature of the instant appeal from the judgment entered by Judge Preska. Accordingly, we direct plaintiffs to pay double costs directly to appellees within ten days of the filing of this order. We direct that plaintiffs personally pay a total of 50% of such costs, and that the remaining 50% be paid by plaintiffs' counsel for their facilitation of this frivolous appeal. The total liability of plaintiffs' counsel shall be apportioned as follows: 60% to be paid by Marc S. Dreier, Dreier LLP, New York, NY; 20% to be paid by Jeffrey H. Howard, Crowell & Moring LLP, Washington, D.C.; and 20% to be paid by Boies, Schiller & Flexner LLP, Armonk, NY.

CONCLUSION

The District Court correctly concluded that it lacked subject matter jurisdiction over plaintiffs' claims under the *Rooker-Feldman* doctrine, and we therefore affirm its dismissal of plaintiffs' claims. We also affirm the District Court's entry of a permanent injunction restricting plaintiffs'

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or suit is dismissed in any district court . . . for want of jurisdiction, such court may order the payment of just costs"), all of which permit the imposition of appropriate sanctions following dismissal for lack of subject matter jurisdiction.

ability to initiate future federal litigation concerning the Premises, and requiring that plaintiffs append the District Court's opinion and order of injunction to future filings in state courts. Finally, we award double costs, as set forth above.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
AUG 16 2002
S.D. OF N.Y.

ULYSSES I & COMPANY, INC.,

Plaintiff,

-against-

GARY FELDSTEIN,

Defendant.

SHELDON SOLOW,
MARC DREIER, and
STUART SCHLESINGER,

Additional defendants on the Counterclaims.

01 Civ. 3102 (LAP)

JUDGMENT AND ORDER OF PERMANENT INJUNCTION

WHEREAS defendant Gary Feldstein ("Feldstein") moved for an order (1) dismissing plaintiff Ulysses I & Company, Inc.'s ("Ulysses") Second Amended Complaint pursuant to Rules 9(b), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and (2) enjoining Ulysses from pursuing any further claims against Feldstein with respect to the premises at issue in this action;

WHEREAS, Peter Morton ("Morton"), who was formerly a defendant in this action and who asserted various counterclaims against Ulysses, former plaintiff Bridgewater

Operating Corporation ("Bridgewater") and additional defendants Sheldon Solow ("Solow"), Marc Dreier ("Dreier"), and Stuart Schlesinger ("Schlesinger"), moved, by order to show cause, to dismiss the complaint and to vacate three notices of pendency filed with the Clerk of Suffolk County, to enjoin Ulysses from initiating any further litigation with respect to the beachfront property located at 57 West End Road, East Hampton, New York (the "Premises") or against the defendants without permission from the Court and for attachment against the assets of Ulysses and any interest in personal property of any debt owed it in New York up to $1,464,242.39;

WHEREAS, Dreier moved to dismiss the counterclaims asserted against him pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted;

WHEREAS, the Court issued a Memorandum and Order dated August 8, 2002; it is hereby

ORDERED, ADJUDGED AND DECREED that Feldstein's motion to dismiss the Second Amended Complaint is granted; and it is further

ORDERED, ADJUDGED AND DECREED that Morton's state counterclaims are dismissed without prejudice and that Morton's federal counterclaim is dismissed with prejudice; and it is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the Court, Supreme Court, County of Suffolk is directed to cancel the three notices of pendency recorded on (i) April 12, 2001; (ii) April 12, 2001; and (iii) April 25, 2001 for the Premises described as "57 West End Road, District 0301, Section 01500, Block 055, Lot 008000, Town of East Hampton, County of Suffolk and State of New York" filed by Ulysses and Bridgewater; and it is further

ORDERED, ADJUDGED AND DECREED that Ulysses, and any of its shareholders, directors, or officers, or any individual, entity or affiliate acting for it, at its behest, or in concert with it, including but not limited to Bridgewater,

Solow, Schlesinger and Steven Cherniak ("Cherniak"), are hereby permanently enjoined and restrained from intervening in a pending action or proceeding, making any motions therein, or filing or attempting to initiate any new action or proceeding in any federal (i) court, (ii) agency, (iii) tribunal, (iv) committee or other federal forum of the United States against Feldstein, his spouse, his successors and assigns, Medical Care Services of Manhattan, P.C., the Decten Fund L.P. ("Decten"), Joan Taverni ("Taverni"), Edward P. Romaine ("Romaine"), and/or Morton, that is in any way, directly or indirectly, connected with or related to the Premises without first obtaining leave of this Court to take such action; and it is further

ORDERED, ADJUDGED AND DECREED that Ulysses, and any of its shareholders, directors, or officers, or any individual, entity or affiliate acting for it, at its behest, or in concert with it, including but not limited to Bridgewater, Solow, Schlesinger and Cherniak, shall not intervene in a pending action or proceeding, make any motions therein, or file or attempt to initiate any new action or proceeding in any state, county, municipal or other non-federal (i) court, (ii) agency, (iii) tribunal, (iv) committee or other forum in the United States against Feldstein, his spouse, his successors and assigns, Medical Care Services of Manhattan, P.C., Decten, Taverni, Romaine and/or Morton that is in any way, directly or indirectly, connected with or related to the Premises, without appending to the first paper served on each defendant and the first paper filed or docketed a statement entitled "Informational Statement Concerning Litigation History of Ulysses I & Co. Pursuant to Court Order." To this statement shall be attached (a) a copy of the Memorandum and Order of this Court, dated August 8, 2002; and (b) a copy of this instant Judgment and Order of Permanent Injunction; and it is further

ORDERED, ADJUDGED AND DECREED that failure to comply with the terms of this Judgment and Order of Permanent Injunction shall subject Ulysses and any of its shareholders, directors, officers or any other individual

or entity acting for it, at its behest, or in concert with it, or at its direction or instigation, including but not limited to Bridgewater, Solow, Schlesinger and Cherniak, to applicable penalties for contempt of court, including fine or imprisonment or both; and it is further

ORDERED, ADJUDGED AND DECREED that nothing in this Judgment shall be construed as denying Ulysses access to the United States Court of Appeals for the Second Circuit; and it is further

ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction of the matter to enforce this Judgment and Order of Permanent Injunction.

Dated: New York, New York
August 15, 2002

/s/ Loretta A. Preska
U.S.D.J.

Entered this __ day of 8/23, 2002

Clerk of the Court

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ULYSSES I & COMPANY, INC.,

Plaintiff,

-v.-

GARY FELDSTEIN,

Defendant.

01 Civ. 3102 (LAP)

MEMORANDUM AND ORDER

SHELDON SOLOW,
MARC DREIER and
STUART SCHLESINGER,

Additional defendants on the Counterclaims.

LORETTA A. PRESKA, United States District Judge:

Plaintiff Ulysses I & Company, Inc. ("Ulysses") brings this second amended complaint ("Second Amended Complaint") against defendant Gary Feldstein ("Feldstein") for violations of federal law under the Racketeer Influenced & Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and for common law fraud and unjust enrichment arising from Feldstein's alleged unlawful scheme to: (1) misappropriate millions of dollars from Total Physicians Services, Inc. ("TPS"), (2) use the stolen funds to acquire and maintain control over certain oceanfront property in East Hampton, New York, which rightfully belongs to Ulysses, and (3) falsify public documents, obstruct the administration of justice and improperly enlist the police to perpetuate his fraudulent scheme and control of the premises. Peter Morton ("Morton"), formerly a defendant in this action, brings counterclaims against Ulysses, former plaintiff Bridgewater

Operating Corporation ("Bridgewater") and additional defendants Sheldon Solow ("Solow"), Marc Dreier ("Dreier") and Stuart Schlesinger ("Schlesinger"), alleging tortious interference, intentional infliction of injury, abuse of process, engagement in serial litigation, violation of New York Judiciary Law § 487(a) and violation of 28 U.S.C. § 1927.[1]

Feldstein now moves for an order: (1) dismissing Ulysses' Second Amended Complaint pursuant to Rules 9(b), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and (2) enjoining Ulysses from pursuing any further claims against Feldstein with

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[1] Solow admittedly has a financial interest in Ulysses. (Notice of Motion, Declaration of Kevin L. Smith, sworn to on November 13, 2001 ("Smith Decl."), ¶ 18 & Ex. D). Schlesinger is an officer of Ulysses — allegedly its president. (Schlesinger Mem. Opp. Order to Show Cause, at 17). Ulysses is an affiliate of Bridgewater by reason of common ownership and control. (Notice of Motion to Dismiss the Second Amended Complaint and For Injunctive Relief ("Notice of Motion to Dismiss SAC"), Ex. 9, at 4).

In his deposition, Schlesinger disclosed that Ulysses does not appear to operate as a business:

> Q: Are there any full-time employees of [Ulysses]?
>
> A: No.
>
> Q: Are there any part-time employees of the company?
>
> A: No. Q: Does the company have a payroll?
>
> A: No.
>
> Q: Does Mr. Cherniak receive any compensation for acting as vice president?
>
> A: No.
>
> Q: Do you know what he does for a living?
>
> A: He is an officer of Solow Development Corporation. I think he is an officer. He is involved with Solow Development Corporation.

(Reply Declaration of Kevin L. Smith in Further Support of Feldstein's Motion to Dismiss the Second Amended Complaint ("Smith Reply Decl."), Ex. 3, at 10).

respect to the Premises at issue in this action. Morton also moves, by order to show cause, to dismiss the complaint and to vacate three notices of pendency filed with the Clerk of Suffolk County, to enjoin Ulysses from initiating any further litigation over the Premises or against the defendants without permission from the Court and for attachment against the assets of Ulysses and any interest of Ulysses in personal property or any debt owed it in New York up to $1,464,242.39. Dreier moves to dismiss the counterclaims asserted against him pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. For the foregoing reasons, Feldstein's motion to dismiss the Second Amended Complaint is granted, Morton's state counterclaims are dismissed without prejudice, and Morton's federal counterclaim is dismissed with prejudice.

BACKGROUND

Rounick-Feldstein Contract

This litigation has a long and sordid history. In or about October 1992, Jack Rounick ("Rounick"), the owner of certain property located at 57 West End Road, in the town of East Hampton, County of Suffolk and State of New York (the "Premises"), entered into a lease agreement (the "1992 Lease") with Feldstein by which Feldstein, as tenant, took possession of the Premises, including Rounick's personal furnishings. (Second Amended Complaint ¶ 5). In May 1993, Rounick and Feldstein entered into a sales contract ("Sales Contract") superceding the 1992 Lease, whereby Feldstein agreed to purchase the Premises (exclusive of Rounick's furnishings) for $7 million: $1.7 million (including the amount already paid under the 1992 Lease) in installments before the scheduled closing, $1.3 million upon closing and $4 million in installments on specified dates after the closing. (*Id.* ¶ 6 & Ex. A). The Sales Contract provided that the closing date would be on or before October 1, 1997. (*Id.* ¶ 7). The Sales Contract further provided that Feldstein could continue to occupy the Premises until the closing date, provided that he met his periodic payments and other

obligations under the Sales Contract. (*Id.* ¶ 8). If the scheduled closing date passed and Feldstein failed to close, according to the Sales Contract, Feldstein would have to vacate the Premises. (*Id.*).

On May 30, 1997, Rounick and Feldstein executed a second amendment to the Sales Contract ("Second Amendment"), extending the closing date until October 1, 1998. (*Id.* ¶ 7 & Ex. B). The Second Amendment also provided that Feldstein could accelerate this closing date if he made an advance payment, upon such election, in the amount of $1.1 million. (*Id.*).

In or about June 1998, Ulysses alleges, Feldstein informed Rounick that he was "having financial difficulties" and likely would be unable to purchase the Premises as scheduled. (*Id.* ¶ 9). As a result, Rounick sought another purchaser for the Premises. (*Id.*). According to Ulysses, however, Feldstein "undertook to acquire the Premises with stolen monies, enlisting the aid of various third parties towards that end." (*Id.* ¶ 10). Feldstein, Ulysses alleges, "devised a plan by which, to the very substantial detriment of TPS's creditors, he would illegally divert funds from TPS to purchase the Premises," which resulted in TPS filing for bankruptcy in August 1998. (*Id.* ¶ 12). As the Chairman and Chief Executive Officer of TPS — which purported to be a specialist in the treatment of HIV/AIDS patients and funded primarily through Medicare and Medicaid participation — Feldstein acquired a number of other medical practices, beginning in August 1996. (*Id.* ¶¶ 11, 13, 18, 20, 22, 24). Due to "these fraudulent acquisitions of medical practices, Feldstein illegally converted to his personal use cash or assets of not less than $5 million." (*Id.* ¶ 26). Ulysses alleges that Feldstein also engaged in a number of additional schemes that "robbed" TPS of "millions of dollars and rendered [it] insolvent." (*Id.* ¶ 35).

On August 10, 1998, Feldstein entered into an Agreement to Assign and Assume ("Agreement to Assign") with Morton, whom Ulysses describes as "a Las Vegas casino owner with a history of violations of the federal election laws, and related

money laundering." (*Id.* ¶ 36). Pursuant to that agreement, Feldstein agreed to assign to Morton all of Feldstein's rights and obligations under his Sales Contract with Rounick. (*Id.* ¶ 37). The Agreement to Assign provided that Morton would pay Feldstein $9.7 million, of which $970,000 was deposited in escrow with Stroock & Stroock & Lavan LLP ("Stroock"). (*Id.* ¶ 37 & Ex. L). Ulysses alleges that, several days after executing the Agreement to Assign, Feldstein requested Rounick's consent to the assignment, but Rounick refused. (*Id.* ¶ 38). Rounick also allegedly refused Feldstein's offer on a "discounted" purchase price. (*Id.*).

On August 20, 1998, Stroock wrote to Rounick informing him that Stroock's client, Feldstein, had entered into an assignment to assign his contractual right to purchase the Premises. (*Id.* ¶ 39 & Ex. M). In this letter, Feldstein offered two alternatives to Rounick: (1) amend the existing contract between Rounick and Feldstein "to cause a mutually agreeable amount representing the present discounted value of all future payments to be made to [Rounick] under [the existing contract] to be paid to [Feldstein] at the closing of title to the property"; or (2) Feldstein and Morton would "accelerate the closing of title" to the Premises to August 28, 1998, with Morton assuming all of Feldstein's payment obligations under the existing contract. (*Id.*).

Rounick construed Feldstein's letter as a renunciation of the Sales Contract and a forfeiture of any remaining rights Feldstein may have had thereunder. (*Id.* ¶ 43). Therefore, on August 25, 1998, Rounick executed a contract for sale for the Premises to Ulysses ("Ulysses Sales Contract") in the amount of $4,925,000, which is approximately the same amount that would have otherwise been due from Feldstein to Rounick under the original Sales Contract. (*Id.* ¶ 44 & Ex. N).[2] On August 28, 1998, the title company submitted

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[2] Ulysses was incorporated on or about August 17, 1998 — approximately eight days before Rounick sold the premises pursuant to the Ulysses Sales Contract. (Smith Reply Decl., Ex. 2).

the deed for recording in the Office of the County Clerk. (*Id.* ¶ 68 & Ex. V).

On the same day that Rounick executed the contract for sale to Ulysses, Rounick wrote to Feldstein indicating that he had done so. (*Id.* ¶ 45 & Ex. O). According to Ulysses, however, Feldstein ignored this notice and did not make the monthly payment of $33,500 due under the Sales Contract on September 1, 1998, nor did he pay real estate taxes due the day before. (*Id.* ¶ 46). Rather, by letter dated September 3, 1998, Stroock informed Rounick and Ulysses that Feldstein intended to accelerate the closing date of the sale of the Premises to September 10, 1998 and that Stroock expected both Rounick and Ulysses to be present "and to be prepared to fulfill [their] obligations pursuant to the Contract." (*Id.* ¶ 47, Ex. P). On September 10, 1998, Feldstein "held a sham 'closing' of the Sales Contract at the offices of his counsel, without Rounick in attendance." (*Id.* ¶ 48).

Thereafter, Ulysses alleges,

> Feldstein had been occupying the Premises pursuant to an interim arrangement under the Sales Contract. He was obligated to vacate the Premises if he failed to close on the purchase as of the scheduled closing date. However, after failing to close, Feldstein refused to surrender the Premises to either Rounick or Ulysses.
>
> Instead, Feldstein transferred possession of the Premises to Morton, again without the consent of either Rounick or Ulysses. Morton paid Feldstein certain "rent" money for the property on which Ulysses, not Feldstein, held title, and Feldstein absconded with this money to California, where he took up residence in the house he acquired with the funds he had stolen from TPS.

(*Id.* ¶¶ 54-55). Ulysses alleges that, "[i]n furtherance of the unlawful scheme," Morton took possession of the Premises in May 1999 and thereafter resided there along with his sister, Mara Gibbs ("Gibbs"), and his lawyer, Errol Margolin ("Margolin"). (*Id.* ¶ 56-57). Ulysses further alleges that it

was forbidden from entering the Premises on numerous occasions, with the unlawful enlistment of several members of the East Hampton Police Department. (*Id.* ¶¶ 58-66).

Suffolk County Action

On August 31, 1998, Feldstein commenced an action against Ulysses in Supreme Court, Suffolk County, to enforce the Sales Contract ("Suffolk County Action"). (*Id.* ¶ 69). Feldstein also filed a Notice of Pendency dated the same day. (*Id.* ¶ 69, Ex. X). Ulysses alleges, however, that the stamp-date on the Notice of Pendency was altered, and that Romaine, as Suffolk County Clerk, was "enlisted by Feldstein to knowingly use his office to unlawfully assist Feldstein in his illegal scheme." (*Id.* ¶ 67, 69-71). Further, Ulysses alleges, on or about September 9, 1998, Romaine rejected the August 28 submission from Ulysses' title company, which he did not re-execute, re-submit and record until September 21, 1998. (*Id.* ¶ 68). Ulysses alleges that:

> [a]s a result of the foregoing manipulation of recording and filing dates, Feldstein, with Romaine's assistance, created the false impression that his Notice of Pendency preceded the transfer of title in the Premises to Ulysses. In fact, however, Ulysses obtained good title on August 25, 1998 and duly submitted the deed for recording on August 28, 1998.

(*Id.* ¶ 72).

On January 31, 2000, the Honorable Gerard D'Emilio, Justice of the Supreme Court of the State of New York, County of Suffolk, granted Feldstein's motion for specific performance on his Sales Contract (the "January 31 Decision and Judgment"). (*Id.* ¶ 74 & Ex. Z). Ulysses alleges that, "[a]fter the January 31 Decision and Judgment was issued by Justice D'Emilio, Feldstein's counsel, Kevin Smith ('Smith'), spoke on the phone *ex parte* with Justice D'Emilio's law clerk, Gary Brunjes, and with Romaine," and that those individuals "agreed among themselves, all without Ulysses' knowledge, that, despite the direction of the Court, Romaine would not file the January 31 Decision and Judgment but

rather that a new judgment prepared by Smith would be substituted." (*Id.* ¶ 77). Ulysses alleges that, "in clear violation of due process (as embodied in CPLR 5016(c))," Romaine entered a new judgment prepared by Feldstein's attorney dated February 7, 2000 (the "Suffolk County Judgment"). (*Id.* ¶ 78 & Ex. 2). On October 10, 2000, that judgment was affirmed on appeal: the Appellate Division found that Feldstein "was ready, willing, and able to perform his obligations under the contract even though his tender of performance was excused by the defendant seller's anticipatory breach." *Feldstein v. Rounick,* 276 A.D.2d 523, 714 N.Y.S.2d 689, 690 (App. Div. 2d Dept. 2000).

In April 2001, Ulysses moved in state court pursuant to CPLR 5015(a)(2) and (3) to vacate the Suffolk County Judgment on the ground that it was entered in violation of both due process and the mandatory notice procedures set forth in CPLR 5016(c). (Second Amended Complaint ¶ 85). On May 14, 2001, the Honorable John J.J. Jones Jr., Justice of the Supreme Court of the State of New York, County of Suffolk, granted Ulysses' motion, vacated the Suffolk County Judgment pursuant to CPLR 5015(a)(3) and directed Feldstein to submit a new judgment (although the court still concluded that Feldstein was entitled to specific performance of the contract). (*Id.* ¶ 85, 714 N.Y.S.2d 689, Ex. 6). Feldstein moved for leave to renew and/or reargue the May 14 order. On October 2, 2001, Justice Jones granted Feldstein's motion and reinstated the Suffolk County Judgment. (*Id.* ¶ 86, 714 N.Y.S.2d 689, Ex. 22). On June 10, 2002, the Appellate Division affirmed the state court's October 2 holding, finding that Ulysses had "failed to establish that the judgment was procured by fraud, misrepresentation, or other misconduct" and had "failed to show that the alleged newly-discovered evidence could not have been discovered with due diligence before entry of the judgment." *Feldstein v. Rounick,* 743 N.Y.S.2d 735, 736 (App. Div. 2d Dept. 2002).

Town of East Hampton Action

On or about April 30, 1999, Ulysses filed against Feldstein and numerous other unnamed defendants a Notice of Petition to Recover Possession of Real Property in the East Hampton Justice Court, Town of East Hampton, County of Suffolk, State of New York (Order to Show Cause, Exhibits to Motion to Dismiss ("OTSC Exhibits"), Ex. 30 (the "Petition")). The Petition sought final judgment of eviction and the awarding of the Premises to Ulysses. (*Id.*). After Feldstein served opposition papers, Ulysses apparently withdrew the Petition. (Order to Show Cause ¶ 34).

Eastern District Actions

On June 4, 1999, Ulysses commenced a diversity action by order to show cause against Morton in the United States District Court for the Eastern District of New York, alleging, *inter alia,* slander of title with respect to the Premises, conspiracy to interfere tortiously with Ulysses' contractual relations with Rounick and conspiracy to interfere tortiously with Ulysses' quiet possession and enjoyment of its real property. (OTSC Exhibits, Ex. 31). On November 5, 1999, the Honorable Michael L. Orenstein, United States Magistrate Judge, issued a Report and Recommendation to dismiss the action without prejudice pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure for failure to join a necessary party: Feldstein. (*Id.* at 14). On January 6, 2000, the Honorable Dennis J. Hurley adopted Judge Orenstein's Report and Recommendation. (OTSC Exhibits, Ex. 32).

On or about April 6, 2000, Ulysses filed an amended complaint against Morton, Feldstein, Romaine and various entities in the District Court for the Eastern District of New York (the "Eastern District Action"). (Notice of Motion to Dismiss SAC, Ex. 5). The complaint alleged, *inter alia,* violations of 42 U.S.C. § 1983, intentional interference with the quiet possession and enjoyment of real property, intentional interference with contractual relations and conversion. The complaint focused on the defendants' alleged "unlawful conspiracy" to take from Ulysses the Premises to which

Ulysses allegedly acquired title in August 1998 from Rounick. The complaint alleged that, since that date, while Ulysses has paid all property taxes and utility charges on the property, the defendants have excluded Ulysses from the Premises and falsely held themselves out as its owners and/or occupants. (*Id.* ¶ 13). The complaint further alleged that Justice D'Emilio entered judgment awarding the Premises to Feldstein in violation of the CPLR and the Due Process clause to the United States Constitution. (*Id.* ¶ 14).

On August 1, 2000, Judge Hurley orally dismissed the Eastern District Action. (OTSC Exhibits, Ex. 12). Judge Hurley stated that "the gravamen of plaintiff's complaint . . . is quite clearly that Justice D'Emilio was wrong," (*id.* at 31), and concluded that the Court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine because "there is an available mechanism obviously to review the work product of Justice D'Emilio, and that's via an appeal to the Second Department," (*id.* at 32).[3] Judge Hurley also held that "[t]he doctrine of collateral estoppel is clearly applicable here." (*Id.* at 39). The judgment was entered on September 11, 2000. On April 18, 2001, the Court of Appeals affirmed the judgment, and on October 29, 2001, the Supreme Court denied certiorari. *Ulysses I & Co. v. Morton,* 11 Fed. Appx. 14 (2d Cir.), *cert. denied,* 122 S.Ct. 458 (2001).

Southern District of Florida Bankruptcy Action

On August 18, 1998, TPS and TPS of Florida, Inc. filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, which were later converted to Chapter 7 liquidation proceedings. (Notice of Motion to Dismiss SAC, Ex. 9, at 2). The Trustee commenced several adversary proceedings on behalf of the estate, including one against Feldstein for fraudulent transfers. (*Id.* at 3). On April 11, 2001, the Trustee filed a motion to approve a settlement agreement

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[3] With respect to Ulysses' argument that "the judgment departs from Justice D'Emilio's decision," (*id.* at 34), Judge Hurley found that "[t]o the extent there's an irregularity in the judgment, that should have been addressed in the State, presumably to Justice D'Emilio," (*id.* at 35).

between itself and Feldstein. (*Id.* at 7). On April 30, 2001, a visiting judge, Thomas A. Ulschig, held a hearing on the motion. (*Id.*). Bridgewater — which is an affiliate of Ulysses by reason of common ownership and control and had purchased the claims of Sprout Capital VII, L.P. in this bankruptcy — objected to approval of the settlement agreement. (*Id.* at 7-8). Judge Ulschig also heard arguments "regarding Ulysses' pattern of litigiousness and how Bridgewater's request is really a dispute over the Hampton's [sic] property." (*Id.* at 8). Judge Ulschig then ruled from the bench that the settlement should be approved. (*Id.* at 9). Bridgewater appealed that decision to the United States District Court for the Southern District of Florida, which held, in November 2001, that Bridgewater's appeal should be dismissed as moot because "[b]oth the TPS and Feldstein have acted in reliance on the settlement agreement, and Bridgewater has done nothing to prevent its consummation," so "effective judicial relief no longer can be granted." (*Id.* at 17). In so ruling, the court observed:

> From the history of the suits, it appears that this appeal and Bridgewater's motions underlying the orders from which Bridgewater appeals are yet another attempt by Ulysses to gain possession of the Hamptons property. As Bridgewater's counsel acknowledged to the bankruptcy court, "We have a claim against Dr. Feldstein and we don't like the guy, and we think that the sale in New York should not go forward. We concede that."

(*Id.* at 5 (citation omitted)). On June 24, 2002, the Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of Bridgewater's appeal. (Letter from Errol F. Margolin to the Court, dated July 9, 2002, Ex. 1).

The Instant Action (Southern District of New York)

On or about April 12, 2001, plaintiffs Bridgewater and Ulysses filed a complaint in the Southern District of New York (the "Original Complaint") against defendants Feldstein, Stroock, Smith, Joan Taverni, Decten Fund, L.P., Andrea Benko, Morton, Gibbs, Margolin, Romaine, Patrick Aube,

Richard Schneider, Kenneth Brown and Gerard Larsen (collectively the "Original Defendants"). The Original Complaint alleges violations of federal RICO law, civil rights violations under 42 U.S.C. § 1983 and violations of the common law "arising from defendants' unlawful conspiracy to misappropriate and share for their own wrongful benefit millions of dollars diverted from [TPS], ostensibly a healthcare provider for HIV/AIDS patients supported by Medicaid/Medicare funding but in fact a sham company ultimately driven into bankruptcy by this massive fraud to the detriment of TPS's creditors." (Original Complaint at 2).

On or about October 10, 2001, plaintiffs Bridgewater and Ulysses filed an amended complaint (the "Amended Complaint") against most of the Original Defendants but did not include Stroock, Smith or Margolin.[4] As in the Original Complaint filed on April 12, the Amended Complaint asserted claims for violations of federal law under RICO, civil rights violations under 42 U.S.C. § 1983 and for violations of the common law "arising from defendants' unlawful conspiracy to misappropriate and share for their own wrongful benefit millions of dollars diverted from [TPS], ostensibly a healthcare provider for HIV/AIDS patients supported by Medicaid/Medicare funding but in fact a sham company ultimately driven into bankruptcy by this massive fraud to the detriment of TPS's creditors." (Amended Complaint at 1-2).

On or about November 5, 2001, in response to the Amended Complaint, Morton brought counterclaims against Ulysses, Bridgewater, Solow, Dreier and Schlesinger

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[4] The so-called "Amended Complaint" is not technically an amendment to the Original Complaint, but rather an entirely new complaint with a different docket number (01 CV 9026). The civil cover sheet for the Amended Complaint indicates that a similar case assigned to Judge Owen — *i.e.*, the Original Complaint — had been voluntarily dismissed on October 10, 2001. (OTSC, Ex. 15). The Original Complaint, however, was never actually discontinued. On the same day that the Amended Complaint was filed, it was referred to Judge Owen as possibly related to the Original Complaint (01 CV 3102). On October 18, 2001, Judge Owen accepted reference of the Amended Complaint.

("Morton's Counterclaims") alleging tortious interference, intentional infliction of injury, abuse of process, engagement in serial litigation, violation of New York Judiciary Law § 487(a) and violation of 28 U.S.C. § 1927.

On or about November 9, 2001, defendants Morton, Gibbs, Aube and Margolin (collectively the "Morton Defendants") moved by order to show cause: (1) to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure; (2) to vacate the three notices of pendency filed with the Clerk of Suffolk County by either Bridgewater or Ulysses based upon (i) the Amended Complaint, (ii) an unfiled action in the Southern District of New York ostensibly brought on behalf of the United States, and (iii) the Eastern District Action, (OTSC Exhibits, Exs. 18-20);[5] (3) to enjoin Ulysses from initiating any further litigation over the Premises or against the defendants without permission from the Court; and (4) for attachment pursuant to FRCP 64 and CPLR Article 62 against Ulysses on Morton's counterclaims against it and the other counterclaim defendants (Bridgewater, Solow, Schlesinger and Dreier). The Morton Defendants argued, *inter alia,* that this Court lacks jurisdiction under the *Rooker-Feldman* doctrine applicable to the Suffolk County Judgment, Ulysses' claims are barred by *res judicata* and collateral estoppel and Ulysses has not alleged a RICO claim.

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[5] On October 11, 2001, Smith wrote to Schlesinger at Ulysses advising that Schlesinger could pick up a check for Ulysses in the amount of $2,136,833.33 representing the balance of the purchase price due under the relevant contract after adjustment for the relevant transfer tax. (OTSC Exhibits, Ex. 24). Smith indicated, however, that he would only hand over the check "upon signing a receipt for them and deliverying [sic] cancellations of the three Notices of Pendency which Ulysses and Bridgewater Operating Corp. filed against the Premises." (*Id.* at 1, 647 N.Y.S.2d 820). Apparently neither Ulysses nor any of its representatives have done so.

The status of these Notices of Pendency is not entirely clear. (*See* Schlesinger Mem. Opp. Order to Show Cause, at 15 ("[C]ertain intervening factors have caused the Notices of Pendency to become ineffective since their filing. . . .").

On the same day that the Morton Defendants moved by Order to Show Cause, the case was reassigned from the Honorable Richard Owen to the Honorable Lewis A. Kaplan. Also that day, an order to show case was issued upon the Morton Defendants' application, which, *inter alia,* (1) temporarily restrained Ulysses and all other persons or garnishees from transferring or paying to any third party any of its assets in New York up to $1,464,242.39, and (2) set forth a briefing schedule.

On November 13, 2001, defendants Feldstein, Joan Taverni and Decten Fund L.P. moved for an order: (1) pursuant to Rules 9 and 12(b)(1) and (6) of the Federal Rules of Civil Procedure dismissing the amended complaint; (2) enjoining plaintiffs Bridgewater and Ulysses, their officers, directors, agents and employees from pursuing any further claims against those defendants; and (3) such other and further relief as the Court deemed just and proper. These defendants explicitly adopted the arguments made by the Morton Defendants with respect to *Rooker-Feldman, res judicata* and collateral estoppel, but argued separately that, *inter alia,* the complaint failed to state a claim under RICO.

On November 21, 2001, Ulysses filed the Second Amended Complaint against Feldstein. Ulysses is the sole plaintiff in this action, and Feldstein is the sole defendant; the remaining parties were dropped. As with both the Original Complaint and the Amended Complaint, the Second Amended Complaint alleges violations of RICO and common law fraud, but does not allege any violations of 42 U.S.C. § 1983.[6]

On November 30, 2001, the case was reassigned again from Judge Kaplan to me.

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[6] By letter to Judge Kaplan dated November 23, 2001, Ulysses indicated that, because Morton was no longer a defendant, "the emergency proffered as a basis for the Order to Show Cause no longer exists." (Letter from Dreier to Judge Kaplan, dated November 23, 2001).

On December 27, 2001, Feldstein moved to dismiss the Second Amended Complaint, pursuant to Rules 9, 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and for injunctive relief. Feldstein filed a supplemental memorandum of law in support of his motion, once again adopting the arguments made by the Morton Defendants with respect to *Rooker-Feldman, res judicata* and collateral estoppel, and arguing separately that, *inter alia,* the complaint failed to state a claim under RICO and that Ulysses' fraud claim should be dismissed.

On or about January 16, 2002, Counterclaim Defendants Solow and Schlesinger filed answers to Morton's Counterclaims. Dreier, however, filed a motion to dismiss Morton's Counterclaims. Dreier argued that the claims seeking to hold him accountable for the acts of his clients, Ulysses and Bridgewater, should be dismissed because "an attorney representing his clients in good faith can not be held legally accountable to third parties for the acts of his clients." (Mem. at 3). Dreier further asserts that he had no "collateral objective" in using the legal process on behalf of his clients. (*Id.* at 5). Dreier argues that Morton's Section 487(a) claim fails because he fails to demonstrate that Dreier intended to deceive the court or any party. (*Id.*). Finally, Dreier states that the Section 1927 claim fails because that statute does not create an independent cause of action. (*Id.* at 6).

DISCUSSION

I. Applicable Legal Standards

A. Rule 12(b)(1)

In considering a motion to dismiss under Rule 12(b)(1), I must view the complaint in the light most favorable to the plaintiff. *See Yoder v. Orthomolecular Nutrition Inst., Inc.,* 751 F.2d 555, 562 (2d Cir. 1985). A court considering a Rule 12(b)(1) motion to dismiss must "accept as true all material factual allegations in the complaint." *Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.,* 968 F.2d 196, 198 (2d Cir. 1992) (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)). "However, argumentative inferences favorable to the party

asserting jurisdiction should not be drawn." *Id.* at 198 (citing *Norton v. Larney,* 266 U.S. 511, 515 (1925)). Further, a "court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 948 F.2d 90, 96 (2d Cir. 1991), *vacated for reconsideration on other grounds,* 505 U.S. 1215 (1992), *reaff'd on remand,* 999 F.2d 33 (2d Cir. 1993).

B. Rule 12(b)(6)

When deciding a motion to dismiss under Rule 12(b)(6), I must accept as true all well-pleaded factual allegations of the complaint and draw all inferences in favor of the pleader. *See City of Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488, 493 (1986); *Miree v. DeKalb County,* 433 U.S. 25, 27 n. 2 (1977) (referring to "well-pleaded allegations"); *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1174 (2d Cir. 1993). "[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.,* 62 F.3d 69, 72 (2d Cir. 1995) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d Cir. 1991)). In order to avoid dismissal, plaintiffs must do more than plead mere "[c]onclusory allegations or legal conclusions masquerading as factual conclusions." *Gebhardt v. Allspect, Inc.,* 96 F.Supp.2d 331, 333 (S.D.N.Y. 2000) (quoting 2 James Wm. Moore, Moore's Federal Practice ¶ 12.34[a][b] (3d ed. 1997)). Dismissal is proper only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *accord Cohen v. Koenig,* 25 F.3d 1168, 1172 (2d Cir. 1994).

II. Ulysses' Second Amended Complaint

A. Rooker-Feldman

Feldstein first argues, in part through his adoption of the brief of the Morton Defendants, that Ulysses' claims are barred by the *Rooker-Feldman* doctrine. (Supplemental Mem. Law Supp. Mot. Dismiss Second Am. Compl. at 2).

A challenge pursuant to *Rooker-Feldman* is for lack of subject matter jurisdiction. *Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir.1996). "Under the *Rooker-Feldman* doctrine, lower federal courts lack subject matter jurisdiction over claims that effectively challenge state court judgments." *Kropelnicki v. Siegel,* 290 F.3d 118, 128 (2d Cir. 2002). Further, in addition to claims that were actually litigated in state courts, *Rooker-Feldman* forbids lower federal courts "from exercising jurisdiction over claims that are 'inextricably intertwined' with state court determinations." *Id.* (quoting *D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 482-83 n. 16 (1983)). A "federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco,* 481 U.S. 1, 25 (1987) (Marshall, J., concurring). The Court of Appeals has interpreted the phrase "inextricably intertwined" to mean "at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding . . ., subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion." *Moccio,* 95 F.3d at 199-200.

Feldstein asserts that the Suffolk County Judgment entered by Justice D'Emilio on February 7 precludes Ulysses' instant federal suit. Feldstein cites to the Court of Appeals' decision in *Ulysses I & Co. v. Morton,* 11 Fed. Appx. 14 (2d Cir.), *cert. denied,* 122 S.Ct. 458 (2001), which affirmed Judge Hurley's decision in the Eastern District Action discussed above:

> We affirm the district court's conclusion that Ulysses' claims against the individual defendants are barred under the *Rooker-Feldman* doctrine, because these claims all require, at least in part, a determination that Ulysses has property rights in the premises at issue. As such, an adjudication of these claims would necessitate review of Justice D'Emilio's decision, which is plainly prohibited by *Rooker-Feldman.*

Id. at 15-16. In response, Ulysses argues that, while the Suffolk County Action addressed property ownership, the instant action involves "a pattern of mail fraud and wire fraud designed to steal money and harm Ulysses." (Pl.'s Mem. Opp. at 9). Therefore, Ulysses suggests, "[t]his Court is not being asked to determine and need not determine that the state court wrongly decided any issues before it in order for Ulysses to prevail on these RICO claims." (*Id.*).

Ulysses' federal claims are barred by *Rooker-Feldman* because they are "inextricably intertwined" with the Suffolk County Judgment. It is true that, unlike in the Suffolk County Action, Ulysses is not seeking possession of the Premises here. The claims raised in Ulysses' Second Amended Complaint, however, in essence seek damages for losing the Premises to Feldstein, which claims directly implicate the propriety of the Suffolk County Judgment. Indeed, the Second Amended Complaint focuses almost exclusively on the Sales Contract between Rounick and Feldstein, along with the subsequent disputes among the parties about whom the Premises actually belongs to. Ulysses' RICO claims can only succeed to the extent that Justice D'Emilio wrongly decided the issues before him with respect to the Suffolk County Action. Accordingly, jurisdiction is lacking in this court to hear those claims. *See, e.g., Goldberg v. Roth,* No. 99 Civ. 11591, 2001 WL 1622201, at *5 (S.D.N.Y. Dec. 17, 2001) ("Here, Plaintiff seeks to have me review and 'cure' determinations made by New York state courts. Indeed, many of the constitutional, RICO, conspiracy and other claims asserted by Plaintiff seemingly arise from the alleged injustices of the state court decisions. Plaintiff cannot make an end run around the *Rooker-Feldman* doctrine and into federal court, however, through the mere assertion of new and baseless claims to supplement the old."); *Rene v. Citibank NA,* 32 F.Supp.2d 539, 543 (E.D.N.Y. 1999) (concluding that the Court lacks subject matter jurisdiction under *Rooker-Feldman* to hear plaintiffs' RICO and Section 1983 claims because "plaintiffs ask this Court to review the state court's judgment of foreclosure and eviction, by seeking

damages for the loss of their property"); *Zipper v. Todd*, No. 96 Civ. 5198 (WK), 1997 WL 181044, at *3 (S.D.N.Y. Apr. 14, 1997) ("While it is true that plaintiffs never actually raised the federal claims of Section 1983, RICO and SLAPP violations before the state court, *Rooker-Feldman* precludes district court review of claims 'inextricably intertwined' with state court determinations. The fact that plaintiffs raise new claims under federal statutes does not preclude a finding that they are barred by the *Rooker-Feldman* doctrine."); *see also, e.g., Harris v. New York State Dep't of Health*, 202 F.Supp.2d 143, 166-67 (S.D.N.Y. 2002) (barring plaintiff's ADA and Rehabilitation Act claims because they were "integrally connected with the matters decided in the state administrative proceedings" and "implicate[d] the essence of the issue adjudicated by the state court"); *In Re Goetzman*, 91 F.3d 1173, 1177 (8th Cir.1996) (plaintiff barred under *Rooker-Feldman* from seeking a federal judgment that would alter a state court judgment when "the heart of the state court proceedings" involved a determination of the plaintiff's mortgage payment).

Even if *Rooker-Feldman* were otherwise applicable to the Suffolk County Judgment, Ulysses argues, the doctrine would still not apply because "Ulysses alleges that the state court judgment was obtained through fraud." (Pl.'s Mem. Opp. at 10). The Court of Appeals has held, however, that it has "never recognized a blanket fraud exception to *Rooker-Feldman.*" *Johnson v. Smithsonian Institution*, 189 F.3d 180, 186 (2d Cir. 1999); *see also Kropelnicki*, 290 F.3d at 128 (finding that plaintiff's misrepresentation claim was barred by *Rooker-Feldman* "even accepting as true her claim that she was kept out of the state court action in the first instance by the defendants' misrepresentation"); *Azumendi v. Roth*, No. 99 Civ. 3663 (WK) (DF), 2002 WL 441283, at *10 (S.D.N.Y. Mar. 20, 2002) (plaintiff's allegations of fraud against defendants, *i.e.*, that "defendants falsely created appearance that decedent lived in New York" and that the Surrogate's Court "fraudulently acquired jurisdiction over decedent's estate," did not preclude dismissal under *Rooker-Feldman*); *Bell v. State*, No. 99 Civ. 5809 (AGS), 2000 WL

1273637, at *4 (S.D.N.Y. Sept. 7, 2000) ("[T]he fact that the plaintiff alleges [in federal court] that the State court judgment was procured fraudulently does not remove his claims from the ambit of *Rooker-Feldman.*" (quoting *Dockery v. Culley & Dykman,* 90 F.Supp.2d 233, 236 (E.D.N.Y. 2000))); *Simpson v. Putnam County Nat'l Bank,* 20 F.Supp.2d 630, 633 (S.D.N.Y. 1998) ("Under *Rooker-Feldman* . . . this Court has no authority to review the State Court's judgment. Nor does the fact that plaintiff alleges that the State Court foreclosure judgment was procured by fraud and conspiracy change that result.").

B. *Res Judicata*

Feldstein also asserts, again in part through his adoption of the brief of the Morton Defendants, that all of Ulysses' claims are barred by *res judicata.* (Supplemental Mem. Law Supp. Mot. Dismiss Second Am. Compl. at 3).

"*Res judicata* challenges may properly be raised via a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Thompson v. County of Franklin,* 15 F.3d 245, 253 (2d Cir. 1994) (citations omitted). Under the doctrine of *res judicata,* "once a final judgment has been entered on the merits of a case, that judgment will bar any subsequent litigation by the same parties or those in privity with them concerning the 'transaction, or series of connected transactions, out of which the [first] action arose.'" *Maharaj v. BankAmerica Corp.,* 128 F.3d 94, 97 (2d Cir. 1997) (citation omitted). Further, *res judicata* "prevents a plaintiff from relitigating claims that were or could have been raised in a prior action against the same defendant where that action has reached a final judgment on the merits." *L-Tec Elecs. Corp. v. Cougar Elec. Org., Inc.,* 198 F.3d 85, 87-88 (2d Cir. 1999); *see also Greenberg v. Board of Governors of the Fed. Reserve Sys.,* 968 F.2d 164, 168 (2d Cir. 1992) (*res judicata* bars both "issues actually decided in determining the claim in the first action and . . . issues that could have been raised in the adjudication of that claim" (citation omitted)). "Even claims based upon different legal theories are barred provided they arise from the same transaction or occurrence." *L-Tec,*

198 F.3d at 88; *see also Singh v. Parnes,* 199 F.Supp.2d 152, 158 (S.D.N.Y. 2002) ("[I]t is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies."). "To prove that a claim is precluded under this doctrine, 'a party must show that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.' " *Pike v. Freeman,* 266 F.3d 78, 91 (2d Cir. 2001) (quoting *Monahan v. New York City Dep't of Corr.,* 214 F.3d 275, 284-85 (2d Cir. 2000)).[7]

Res judicata mandates dismissal of all of Ulysses' claims. Ulysses asserts that "[w]hether these acts were illegal," "whether these acts injured Ulysses" and "whether [Feldstein's alleged wrongdoing] may give rise to RICO liability" has "never been addressed," (Pl.'s Mem. Opp. at 13), and that Ulysses' RICO action "seeks a different remedy" from the Eastern District Action, which alleges, *inter alia,*

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[7] *Res judicata* and *Rooker-Feldman* are distinct doctrines:

> [T]he precise demarcations of the *Rooker-Feldman* doctrine on the one hand, and the preclusive effect of common law *res judicata* and collateral estoppel on the other, remain obscure. Some courts hold them effectively synonymous, interchangeable or at least co-extensive. Other courts have conflated the doctrines altogether, citing *Rooker-Feldman* as support for application of what they held to be dismissal based on *res judicata.* A leading treatise characterizes *Rooker-Feldman* as a "transmutation of res judicata doctrine into jurisdictional dogma." And one circuit court has described the principle as "a combination of the abstention and res judicata doctrines. . . ."
>
> And yet the doctrines differ in fundamental ways that may materially affect how a case may be decided. The Supreme Court has instructed that the *Rooker-Feldman* principle addresses the subject matter jurisdiction of federal district courts. . . . By contrast, res judicata and collateral estoppel, resting on common law principles, are affirmative defenses which, if not pleaded, may be waived.

Harris, 202 F.Supp.2d at 158-60 (citations omitted).

civil rights violations, (*id.* at 15). These assertions, however, miss the point. Feldstein's alleged wrongdoing could have been addressed in the Eastern District Action: both Ulysses and Feldstein were parties to that action and the "facts surrounding the transaction or occurrence" supporting Ulysses' RICO claim and state law claims were substantially the same at the time Ulysses filed its Eastern District Action. (*See* Notice of Motion to Dismiss SAC, Supplemental Declaration of Kevin L. Smith, sworn to on December 27, 2001, Ex. 11 (comparing factual allegations in the Eastern District Action with factual allegation in Ulysses' instant RICO complaint)). Further, the Eastern District Action was adjudicated on the merits. *See Ulysses,* 11 Fed. Appx. 14; *see also, e.g., Kalka v. Kucher Kraus & Bruh, LLP,* No. 99 Civ. 4999 (MBM), 2000 WL 557266, at *9 (S.D.N.Y. May 8, 2000) ("[Plaintiff] claimed in the state courts that she had a contract to buy the apartment at issue, that certain of her payments were mischaracterized as down payments rather than rent payments, and that she should not have been evicted. Again, her assertions and defenses were rejected. Further, she sued Yuri Chuu in this court for conduct arising out of the dispute over the Chuu apartment, and agreed to dismiss that case, with prejudice, on January 5, 1999. Whether or not she asserted RICO claims in that case, she could have.").[8]

Ulysses asserts that *res judicata* should not bar the RICO action because certain of the predicate acts forming these claims "were not discovered and, in part did not occur," until after Justice D'Emilio's decision in the Suffolk County Action and the decision in the Eastern District Action "predicated on Justice D'Emilio's decision." (Pl.'s Mem. Opp. at 13). I reject this argument. "As a general rule, newly discovered evidence does not preclude the application of *res judicata.*" *Saud v. Bank of New York,* 929 F.2d 916, 920 (2d Cir. 1991).

---

[8] Further, Feldstein asserts that Ulysses' claims are barred by collateral estoppel. Because I find, however, that Ulysses' claims are barred by *Rooker-Feldman* and *res judicata,* I need not address Feldstein's collateral estoppel arguments.

"Exceptions to this rule exist when the evidence was either fraudulently concealed or when it could not have been discovered with due diligence." *Id.* But Ulysses has not identified which predicate acts "in part did not occur" that could arguably form the basis to invoke either exception. In any event, the transaction, or series of connected transactions, out of which the Eastern District Action — and, it appears, the Suffolk County Action — arose had already occurred by the time the Original Complaint, let alone the Second Amended Complaint, was filed. Permitting Ulysses to continue its action at this stage "would elevate form over substance and undermine the fundamental purposes behind the doctrine of *res judicata.*" *Saud v. Bank of New York,* 734 F.Supp. 628, 636 (S.D.N.Y. 1990), *aff'd,* 929 F.2d 916; *see also, e.g., Waldman v. Village of Kiryas Joel,* 39 F.Supp.2d 370, 379 (S.D.N.Y. 1999) (concluding that *res judicata* barred resident's Establishment Clause claims even though complaint relied on facts that post-dated prior judgments), *aff'd,* 207 F.3d 105 (2d Cir. 2000).

C. Failure to state a RICO claim

Because Ulysses' Second Amended Complaint is dismissed pursuant to *Rooker-Feldman* and *res judicata,* I need not address Feldstein's assertion that Ulysses has failed to state a RICO claim.

D. Injunctive Relief

Finally, Feldstein moves to enjoin Ulysses and their officers, directors, agents and employees from pursuing any further claims against Feldstein.

1. Standard

Federal courts may enjoin a party from initiating future vexatious litigation. *See Malley v. New York City Bd. of Educ.,* 112 F.3d 69 (2d Cir. 1997); *Pentagen Technologies Int'l Ltd. v. United States,* 172 F.Supp.2d 464 (S.D.N.Y. 2001). "The federal courts have an institutional concern and obligation to 'protect their jurisdiction from conduct which impairs their ability to carry out Article III functions.'"

Carlin v. Gold Hawk Joint Venture, 778 F.Supp. 686, 694 (S.D.N.Y. 1991) (citation omitted).

"In determining whether or not to restrict a litigant's future access to the courts, courts in this Circuit consider the following factors:

> (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, *e.g.,* does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties."

Lipin v. Nat'l Union Ins. Fire Co., 202 F.Supp.2d 126, 142 (S.D.N.Y. 2002) (quoting *Safir v. United States Lines, Inc.,* 792 F.2d 19, 24 (2d Cir. 1986)). "Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." *Safir,* 792 F.2d at 24. A court may deny injunctive relief based on the defense of unclean hands "where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party." *Estate of John Lennon v. Screen Creations, Ltd.,* 939 F.Supp. 287, 293 (S.D.N.Y. 1996) (citation omitted). But "[m]isconduct . . . unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands." *Dunlap-McCullen v. Local 1-S, AFL-CIO-CLC,* 149 F.3d 85, 90 (2d Cir. 1998) (quoting *A.H. Emery Co. v. Marcan Prods. Corp.,* 389 F.2d 11, 18 (2d Cir. 1968)). Further, "[t]he unclean hands defense is not an automatic or absolute bar to relief; it is only one of the factors the court must consider when deciding whether to exercise its discretion and grant an injunction." *Id.* (quoting 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 2946, at 111 (1995)).

2. Permanent Injunction Against Ulysses

An injunction here is proper. First, as other judges and justices have observed, Ulysses has a history of duplicative litigation with respect to ownership of the Premises — although, admittedly, Ulysses seeks monetary damages in this case rather than ownership. *See, e.g., Ulysses,* 11 Fed. Appx. at 15 (finding that the claims in the Eastern District Action "all require, at least in part, a determination that Ulysses has property rights in the premises at issue"); Notice of Motion to Dismiss SAC, Ex. 9, at 5 ("From the history of the suits, it appears that this appeal and Bridgewater's motions underlying the orders from which Bridgewater appeals [to the Southern District of Florida] are yet another attempt by Ulysses to gain possession of the Hamptons property."). Second, Ulysses cannot have had an objective good faith expectation of prevailing in this case. It knew or should have known that there was a substantial likelihood that its RICO complaint would be dismissed pursuant to *Rooker-Feldman* and *res judicata* — especially considering that the Court of Appeals just last year dismissed the Eastern District Action expressly based on, *inter alia, Rooker-Feldman.* Third, Ulysses is represented by counsel, which weighs in favor of an injunction. *See Iwachiw v. New York City Bd. of Educ.,* 194 F.Supp.2d 194, 208 (E.D.N.Y. 2002) (fact that plaintiff is proceeding *pro se* weighs against an injunction). Fourth, Ulysses has caused needless expense to Feldstein and continues to burden unnecessarily numerous courts and their personnel across the nation, as the facts in the instant complaint essentially arise out of the same facts in a number of previous actions. Fifth, it does not appear that any other sanction short of an injunction will be adequate to protect the courts and other parties from Ulysses' insatiable appetite for litigating about the Premises.

Courts within this Circuit have found that, "when a litigant has shown a pattern of abusing different district courts around the country, an injunction which applies to all federal district courts is warranted." *Sassower v. Abrams,* 833 F.Supp. 253, 270 (S.D.N.Y. 1993); *see Iwachiw,* 194

F.Supp.2d at 208 (requiring plaintiff to seek leave from the court before filing any additional actions against certain parties arising out of or relating to alleged conspiracy to fix bid prices and elimination of the plaintiff as a potential bidder for the sale of equipment and services); *Fitzgerald v. Field,* No. 99 Civ. 3406 (RWS), 1999 WL 1021568, at *6 (S.D.N.Y. Nov. 9, 1999) ("The least restrictive, yet effective, means of preventing further vexatious litigation by Fitzgerald is to enjoin him from filing any civil lawsuit in this Circuit without first obtaining leave of court."); *Jones v. Newman,* No. 98 Civ. 7460 (MBM), 1999 WL 493429, at *14 (S.D.N.Y. June 30, 1999) (enjoining plaintiff from filing "any civil lawsuit related to the underlying subject matter of this suit, other than a petition for habeas corpus, in any court of the United States" without first obtaining leave of such court); *In re NASDAQ Market-Makers Antitrust Litigation,* 187 F.R.D. 124, 132 (S.D.N.Y. 1999) ("It appears that the least restrictive, but effective, means of protecting plaintiffs and the Court from further vexatious litigation by Genins is to enjoin him from filing any further papers in this court that relate in any way to *In re NASDAQ* without first obtaining prior leave of court.").

Injunctive relief directed towards state courts is, if properly framed, also appropriate. In Schlesinger's opposition brief to imposition of a permanent injunction against Ulysses, he asserts that "the courts of this Circuit have consistently refused to tell state courts who can and cannot seek redress before them." (Schlesinger Mem. Law Opp. to Order to Show Cause, at 14). For support, Schlesinger cites *In re Martin-Trigona,* 737 F.2d 1254 (2d Cir. 1984). That case does not support Schlesinger's position. In *Martin-Trigona,* the district court had enjoined Anthony Martin-Trigona ("Martin-Trigona") from, *inter alia:* (1) "making further filings in any pending case brought by him or on his behalf within the District of Connecticut without first obtaining leave of the court"; and (2) "filing any action *in any state or federal court in the United States"* arising out of the bankruptcy proceedings at issue in that case. *Id.* at 1258-59

(emphasis added). The district court provided that, to obtain leave of the court, Martin-Trigona was required to append certain informational materials to his pleadings, including a "Motion Pursuant to Court Order Seeking Leave to File." *Id.* at 1258 n. 3.

On appeal, the Court of Appeals found that the restrictions placed upon Martin-Trigona from bringing "new actions in all federal district courts" was "necessary and proper," *id.* at 1262, but that "extension of the terms of the injunction to state courts" was improper, *id.* at 1263. The Court of Appeals further recognized, however, that it was entirely appropriate to warn state courts about vexatious litigators:

> [T]he protection of federal jurisdiction does not necessarily require extension of each provision of the injunction to actions brought in state courts. It is our independence from other branches of government which is the source of our power to enjoin Martin-Trigona, but that very independence militates against extension of the terms of the injunction to state courts. Abuse of state judicial processes is not *per se* a threat to the jurisdiction of Article III courts and does not *per se* implicate other federal interests. We therefore believe that the district court erred in its blanket extension of the injunction to state courts.
>
> It does not follow, however, that some qualifications relating to the protection of federal interests may not be placed upon Martin-Trigona's resort to state courts. First, while comity usually requires us to abstain from intrusion into state proceedings, *a spirit of cooperative federalism calls upon us to alert state courts to Martin-Trigona's past activities so they may take judicial notice of matters relevant to new litigation brought by him.* Upon remand, therefore, the district court should continue the provisions of the injunction requiring Martin-Trigona to append pertinent informational materials to pleadings in state courts.

> Second, protection of our jurisdiction requires that we shield federal litigants, their counsel, court personnel, their families and professional associates from Martin-Trigona's vexatious litigation in all courts, state or federal.

Id. at 1262-63 (emphasis added). The Court of Appeals concluded that the district court had "erred in its blanket extension of the injunction to state courts" and remanded the case back to the district court to modify the injunction. *Id.* at 1263. On remand, the district court entered a new injunction that, *inter alia:* (1) permanently enjoined Martin-Trigona from initiating any action without leave of the court against certain individuals in the United States Bankruptcy Court for the District of Connecticut, the United States District Court for the District of Connecticut or in the Court of Appeals for the Second Circuit; and (2) required Martin-Trigona to append to any document that either commences a new lawsuit or intervenes in a then-existing lawsuit certain documents, including a statement entitled "Informational Statement Concerning Litigation History of Anthony R. Martin-Trigona, Pursuant to Court Orders." *In re Anthony R. Martin-Trigona,* 592 F.Supp. 1566, 1573 (D.Conn. 1984). The Court of Appeals affirmed the form of this new injunction, as it "complie[d] faithfully with out prior decision." *In re Anthony R. Martin-Trigona,* 763 F.2d 140, 141 (2d Cir. 1985). Therefore, the injunction requested to be issued in this case is, in fact, consistent with the Court of Appeals' *Martin-Trigona* decision.

Finally, I reject Schlesinger's allegation that Feldstein is barred from obtaining injunctive relief because of Feldstein's own unclean hands. (Schlensinger Mem. Law Opp. to Order to Show Cause, at 11-12). Feldstein's alleged misconduct is unrelated to Ulysses' status as a serial litigator with respect to the Premises. In any event, even if it were related, the other factors weigh heavily in favor of granting an injunction.

III. Morton's Counterclaims

Dreier moves to dismiss Morton's Counterclaims. All of Morton's Counterclaims are state law claims except one: a claim pursuant to 28 U.S.C. § 1927 for reasonably incurred excess costs, expenses and attorneys' fees.

A. Section 1927

28 U.S.C. § 1927, entitled "Counsel's liability for excessive costs", provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

An award of sanctions under Section 1927 requires a showing that an attorney undertook or continued a litigation in bad faith, or for some improper purpose such as harassment or delay. *Oliveri v. Thompson,* 803 F.2d 1265, 1272-73 (2d Cir. 1986).

As the Court of Appeals has noted, however, Section 1927 does not create an independent cause of action:

> [F]ederal question jurisdiction [may not] be premised on § 1927, for that section does not appear to authorize an independent lawsuit. It provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The power thereby described is the power of the courts to punish an attorney who conducts frivolous or dilatory litigation by awarding the other side compensation "as part of the costs in the litigation." Though under the present § 1927 "attorneys' fees were intended to be among the costs which a party could request after litigation was completed," the request for such an award

> is nonetheless made in the case in which the attorney's unreasonable conduct is alleged to have occurred. *We have seen no basis for concluding that § 1927 was intended to permit a litigant to institute a new lawsuit to collect excess costs and fees incurred in a prior litigation.* . . . As a statute with a punitive thrust, § 1927 is to be strictly construed, and we cannot conclude that it provides a basis for the present suit.

Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 69-70 (2d Cir. 1990) (emphasis added) (citations omitted). Therefore, this purported claim is dismissed.

B. State Law Claims

With respect to Morton's state law claims, I must determine whether it is proper for me to exercise supplemental jurisdiction over these claims.

Federal courts have power to decide state law claims that "derive from a common nucleus of operative fact" with claims arising under federal law. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Pursuant to 28 U.S.C. § 1367(c)(3), however, a district court may nonetheless decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." Here, all of the claims over which this Court had original jurisdiction have been dismissed. Further, Morton is not any longer even a party to the action over which the Court had original jurisdiction. Accordingly, I decline to exercise supplemental jurisdiction over the Morton Counterclaims, and those claims are dismissed without prejudice.

IV. Notices of Pendency

While still a defendant in the Amended Complaint, Morton moved by order to show cause to vacate the three notices of pendency filed with the Clerk of Suffolk County by either Bridgewater or Ulysses based upon (1) the Amended

Complaint, (2) an unfiled action in the Southern District of New York ostensibly brought on behalf of the United States, and (3) the Eastern District Action.

A. Cancellation

Pursuant to Rule 64 of the Federal Rules of Civil Procedure, I must look to state law to govern the matter of lis pendens.[9] *See* Fed.R.Civ.P. 64; *State Street Bank & Trust Co. v. Trafalgar Power Inc.*, No. 95-CV-493 (FJS), 1997 WL 369384, at *2 (N.D.N.Y. June 23, 1997). Section 6514 of the Civil Practice Law and Rules ("CPLR"), entitled "Motion for cancellation of notice of pendency," provides in pertinent part:

> (a) Mandatory cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated. . . .

N.Y. Civ. Prac. L. & R. § 6514(a) (McKinney's 1980). Here, all three actions underlying the notices of pendency filed by Ulysses on the Premises have been "settled, discontinued or abated." *Id.* Therefore, the three notices of pendency filed by Ulysses and Bridgewater shall be cancelled.[10]

---

[9] The terms "notice of pendency" and "lis pendens" are essentially interchangeable. *See In re American Motor Club, Inc.*, 109 B.R. 595, 596 n. 1 (Bankr. E.D.N.Y. 1990) ("Although technically there are differences between the doctrine of lis pendens at common law and the statutory provisional remedy of notice of pendency, since the CPLR uses the phrase 'notice of pendency' and the bench and bar more often use[ ] the term 'lis pendens,' this Court will use them interchangeably." (citation omitted)).

[10] This Court has the power to cancel Notices of Pendency. *See, e.g., Peddie v. 2436 Marion Ave. Ass'n*, No. 01 Civ. 1239 (LTS) (HBP), 2001 WL 995337, at *2 (S.D.N.Y. Aug. 30, 2001).

B. Costs

Morton also seeks to recover costs against Ulysses in connection with the three notices of pendency. Section 6514(c) of the CPLR provides:

> Costs and expenses. The court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.

I find that an award of costs against Ulysses pursuant to CPLR 6514(c) is not warranted under the circumstances of this case. *See, e.g., Rabinowitz v. Larkfield Building Corp.*, 647 N.Y.S.2d 820, 821-22 (App.Div. 2d Dept. 1996) (finding that award of costs and expenses was not warranted even though notice of pendency was canceled).

CONCLUSION

Ulysses has had so many bites at the apple, it has swallowed the core. Ulysses and its principals have repeatedly used their substantial resources to impose upon the scarce resources of the state and federal courts of several districts and states. They shall not be permitted to continue to do so. Accordingly, Feldstein's motion to dismiss the Second Amended Complaint is granted, Morton's state counterclaims are dismissed without prejudice, and Morton's federal counterclaim is dismissed with prejudice. The Clerk of the Court, Supreme Court, County of Suffolk, is directed to cancel the three notices of pendency filed by Ulysses and Bridgewater.

Counsel shall confer and deliver a proposed form of judgment no later than August 12, 2002, at 4 p.m. If they are not in agreement, counsel shall appear at a conference to discuss the proposed order on August 14, 2002, at 12:00 p.m., Courtroom 12A, United States District Court, Southern District of New York, 500 Pearl Street, New York, New York.

SO ORDERED:

Dated: New York, New York
August 8, 2002

/s/ Loretta A. Preska
LORETTA A. PRESKA, U.S.D.J.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Eighteenth day of April, Two Thousand One.

PRESENT: HON. JOSEPH M. McLAUGHLIN,
HON. FRED I. PARKER,
HON. CHESTER J. STRAUB,

Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED APR 18 2001
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

NO. 00-9189

ULYSSES I & COMPANY, INC.,

Plaintiff-Appellant,

– v. –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants-Appellees.

APPEARING FOR APPELLANT: Marc S. Dreier, Dreier & Baritz LLP, New York, New York

APPEARING FOR APPELLEE: Errol Margolin, Margolin & Pierce, LLP, New York, New York; Mathew E. Pachman, Pachman & Pachman, P.C., Commack, New York; Kevin L. Smith, Stroock & Stroock & Lavan, New York, New York; Theodore Sklar, Bureau Chief, General Litigation Suffolk County, Hauppauge, New York

Appeal from the United States District Court for the Eastern District of New York (Denis R. Hurley, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the said District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Ulysses I & Company, Inc. ("Ulysses") appeals from the judgment of the United States District Court for the Eastern District of New York (Hurley, J.) entered on September 11, 2000, dismissing Ulysses' complaint, asserting claims under 42 U.S.C. § 1983 and pendent state claims, in its entirety. The district court granted the motions of Peter Morton, Gary Feldstein and Mara Gibbs (collectively "the individual defendants") and dismissed the claims against them pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine. The district court granted the motions of the Village of East Hampton, Suffolk County (collectively "the municipal defendants") and Edward P. Romaine as Clerk of Suffolk County and dismissed the claims against them pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

This dispute involves, at its center, a parcel of real property located in East Hampton, New York. Prior to the action in the Eastern District of New York, Justice Gerald D'Emilio, of the New York Supreme Court, Suffolk County, determined that Ulysses was required to convey this property to defendant Feldstein, having determined that Feldstein was entitled to specific performance of a contract for the sale of this property. Justice D'Emilio rejected Ulysses' counterclaims against Feldstein.

Under the so-called *Rooker-Feldman* doctrine, because only the United States Supreme Court can entertain an appeal to reverse or modify a state court decision, if a plaintiff's claims are "inextricably intertwined" with a state court's determinations, a federal district court is without jurisdiction to hear those claims. *See Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) and *Feldman v. District of Columbia Court of Appeals*, 460 U.S. 462, 482-84 n.16 (1983)). We affirm the district court's conclusion that Ulysses' claims against the individual defendants are barred under the *Rooker-Feldman* doctrine, because these claims all require, at least in part, a determination that Ulysses has property rights in the premises at issue. As such, an adjudication of these claims would necessitate review of Justice D'Emilio's decision, which is plainly prohibited by *Rooker-Feldman*.

The district court's dismissal of the 42 U.S.C. § 1983 claims against the municipal defendants was also proper. To demonstrate municipal liability under § 1983, a plaintiff must prove the existence of a municipal policy, practice or custom that is the cause of the plaintiff's injury. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978). Such a policy may be inferred from circumstantial proof, but the mere assertion that a municipality has such a policy is generally insufficient to support such an inference. *See Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993). "A single incident alleged in a complaint, especially if it involved only actors below the policymaking level, generally will not suffice to raise an inference of the existence of a custom or policy." *Id.* The district court concluded, and we agree, that the allegations in the complaint concerning the municipal defendants fail to state a claim under § 1983 because they allege no municipal practice or policy.

We have considered Ulysses' remaining arguments and find them to be without merit.

Appellees Morton and Gibbs have moved for sanctions against Ulysses pursuant to Fed. R. App. P. 38, which provides that "[i]f a court of appeals determines that an appeal is

frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." We hereby DENY this motion.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr
Lucille Carr, Operations Manager

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUDGMENT
CV 00-0654 (DRH)

FILED IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
SEP 13 2000

ULYSSES I & COMPANY, INC.,

Plaintiff,

– against –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

Orders of Hon. Denis R. Hurley, having been filed on August 11, 2000, granting defendants PETER MORTON, MARA GIBBS, and INCORPORATED VILLAGE OF EAST HAMPTON's motions to dismiss the plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6); and an Order of Hon. Denis R. Hurley, having been filed on August 15, 2000, granting defendant STATE OF NEW YORK's motion to dismiss plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12 (b)(1); and an Order of Hon. Denis R. Hurley, having been filed on August 16, 2000, granting defendants GARY FELDSTEIN, SUFFOLK COUNTY, and EDWARD P. ROMAINE, as Clerk of Suffolk County's motions to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6), it is

ORDERED AND ADJUDGED that plaintiff ULYSSES I & COMPANY, INC. take nothing of defendants PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and

EDWARD P. ROMAINE, as Clerk of Suffolk County; and that the Amended Complaint is hereby dismissed in its entirety.

Dated: Central Islip, New York
September 11, 2000

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ Joseph Di Talia
JOSEPH DI TALIA
Deputy Clerk-in-Charge

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00 Civ. 0654 (DRH)

ORDER

ULYSSES I & COMPANY, INC.,

Plaintiff,

v.

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

Defendant Dr. Feldstein having moved to dismiss this action against him pursuant to the provisions of FRCP 12(b)(1) and (6) and plaintiff having opposed such motion and applied to amend its first amended complaint and the parties having appeared before me by their respective counsel on August 1, 2000 and been heard and due deliberation having been had, it is, for the reasons stated on the record on August 1, 2000,

ORDERED:

1. The said motion of defendant Dr. Gary Feldstein to dismiss this action is granted pursuant to FRCP 12(b)(1) for lack of subject matter jurisdiction and additionally pursuant to FRCP 12(b)(6) for failure to state a claim upon which relief can be granted; and

2. Plaintiff's application to amend its first amended complaint is hereby denied.

SO ORDERED.

Dated: Hauppauge, New York
August 16, 2000

/s/ Denis R. Hurley
U.S.D.J.

Appendix H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER

Case No. 00 Civ. 0654
Judge Denis R. Hurley

ULYSSES I & COMPANY, INC.,

Plaintiff,

– against –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

Defendants, Suffolk County and Edward P. Romaine, as Clerk of Suffolk County, having moved to dismiss the plaintiffs' amended complaint against them pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and the parties having appeared before the Court by their respective counsel on August 1, 2000 to be heard and the Court, upon consideration of the submissions by the parties and upon due deliberation having been had, it is, for the reasons stated on the record on August 1, 2000,

ORDERED, that the motion by the defendants Suffolk County and Edward P. Romaine, as Clerk of Suffolk County, to dismiss the plaintiffs' amended complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted is hereby granted and the amended complaint against those defendants is hereby dismissed.

SO ORDERED.

Dated: Hauppauge, New York
August 16, 2000

/s/ Denis R. Hurley
Denis R. Hurley
United States District Court Judge

Appendix I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00 Civ. 0654 (DRH)
ORDER

ULYSSES I & COMPANY, INC.,

Plaintiff,

– against –

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON, and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Defendants.

On August 1, 2000, this Court considered the motion of defendant, Incorporated Village of East Hampton, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the amended complaint, as against the Incorporated Village of East Hampton, (to wit: count one, which alleged a violation of 42 U.S.C. §1983; and count two which sought a declaratory judgment that all determinations in respect of ownership, access and control over the Premises shall heretofore be made by this court and the federal government and not the state and local governmental defendants) for failure to state a claim upon which relief can be granted against it.

The Court examined memorandums of Law submitted in support of, and opposition to, the motion, and heard and considered the arguments of counsel for plaintiff, Ulysses I, and the defendant, The Incorporated Village of East Hampton, and after due deliberation, and for the reasons set in its oral decision spread upon the record on August 1, 2000, it is hereby,

ORDERED, ADJUDGED & DECREED, that defendant, Incorporated Village of East Hampton's motion for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the amended complaint, as to all counts therein alleged against the Incorporated Village of East Hampton for failure, of the plaintiff, to state a claim against the Incorporated Village of East Hampton, upon which relief can be granted against it, is, in all respects, granted.

Dated: August 11, 2000
Hauppauge, New York

/s/ Denis R. Hurley
United States District Judge

Appendix J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Index No. 00 Civ. 0654
(DRH)

Order

ULYSSES I & COMPANY, INC.,

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– against –

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Defendants.

Defendants Peter Morton and Mara Gibbs having moved to dismiss this action against them pursuant to the provisions of FRCP 12(b)(1) and (6) and plaintiff having opposed such motion and applied to amend its first amended complaint and the parties having appeared before me by their respective counsel on August 1, 2000 and been heard and due deliberation having been had, it is, for the reasons stated on the record on August 1, 2000,

ORDERED:

1. the said motion of defendants Peter Morton and Mara Gibbs to dismiss this action is granted pursuant to FRCP 12(b)(1) for lack of subject matter jurisdiction and additionally pursuant to FRCP 12(b)(6) for failure to state a claim upon which relief can be granted; and

2. plaintiff's application to amend its first amended complaint is hereby denied.

SO ORDERED.

Dated: Hauppauge, New York
August 11, 2000

/s/ Denis R. Hurley
U.S.D.J.

Appendix K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ULYSSES I & COMPANY, X
: CV-00-654

Plaintiff,

– against – : U.S. Courthouse
Hauppauge,
New York

PETER MORTON, et al,

Defendants. : August 1, 2000
X 11:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DENIS R. HURLEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

DREIER & BARITZ
499 Park Avenue
New York, NY 10022
BY: MARC DREIER, ESQ.

And

SEAN F. O'SHEA, ESQ.
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New York, NY 10174

For the Defendants:

MARGOLIN & PIERCE
1370 Avenue of the Americas
New York, NY 10019
BY: PHILIP PIERCE, ESQ.
ERROL MARGOLIN, ESQ.

For Defendants Morton and Gibbs

STROOCK & STROOCK & LAVAN
180 Maiden Lane
New York, NY 10038
BY: KEVIN L. SMITH, ESQ.

For Defendant Feldstein

PACHMAN & PACHMAN
366 Veterans Memorial Highway
Commack, NY 11725
BY: MATTHEW PACHMAN, ESQ.
HOWARD PACHMAN, ESQ.

For the Village of East Hampton

SUFFOLK COUNTY ATTORNEY'S OFFICE
100 Veterans Memorial Highway
Hauppauge, NY 11788
BY: THEODORE D. SKLAR, ESQ.

For Suffolk County

Court Reporter: MARY ANN STEIGER
300 Rabro Drive
Hauppauge, New York 11788
(516) 582-1120

Proceedings recorded by mechanical stenography, transcript produced by computer.

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THE CLERK: Calling civil case number 00-654, Ulysses I & Company -v- Peter Morton, et al.

Will counsel note their appearances, please.

MR. PIERCE: If your Honor please, Philip Pierce, speaking for the defendants Morton and Gibbs.

THE COURT: Good morning, Mr. Pierce.

MR. MARGOLIN: Errol Margolin, for the defendants Morton and Gibbs.

THE COURT: Good morning, Mr. Margolin.

MR. SMITH: Kevin Smith, for the defendant Dr. Gary Feldstein.

THE COURT: Good morning, Mr. Smith.

MR. PACHMAN: Good morning, your Honor. Matt Pachman, for the defendant Incorporated Village of East Hampton.

THE COURT: Good morning, Mr. Pachman.

MR. SKLAR: Theodore Sklar, for the defendants Suffolk County and Edward Romaine, Suffolk County Clerk.

THE COURT: Good morning, Mr. Sklar.

MR. DREIER: Your Honor, Marc Dreier with Sean O'Shea, for the plaintiff Ulysses I & Company.

THE COURT: Good morning.

We have a number of motions on today. Firstly, there was a motion made by the defendant State of New York, and I understand that that motion is unopposed and

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the plaintiff consents to the dismissal.

In addition, there's a motion on behalf of the defendants Morton and Gibbs to dismiss. Also, there's a motion by Morton and Gibbs which seeks sanctions against plaintiff and plaintiff's counsel.

There's also a motion to dismiss brought on behalf of Dr. Feldstein, and there's a second or further motion by that moving defendant which seeks that the Court enter an order which would preclude further suits or actions being brought in this Court concerning the subject property.

There's a motion to dismiss by the Village of East Hampton, and there's also an application by plaintiff to amend the complaint.

So, against that backdrop, firstly, I will note that I have read the papers. I think the issues are well framed, so I would prefer not to simply hear what's already in the papers.

But I do have one question of Mr. Dreier. You indicate that in the proceeding in the Supreme Court that you were denied an opportunity to be fully heard on the issues that underlie this action and it's your thought that, because of that, the doctrine in collateral estoppel may not be legitimately invoked.

How were you deprived of an opportunity to be

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heard on some of these issues?

MR. DREIER: Your Honor, first and foremost, we were deprived of an opportunity to participate in the framing of the judgment. The judgment was issued without notice pursuant to ex parte communications between defense counsel in this case. Mr. Feldstein was the plaintiff in that proceeding. The discussions were between counsel, between the County Clerk's Office and between the law clerk for Justice D'Emilio.

Rule 5016(c) under the CPLR provides we're entitled to notice on motion for judgment that affects injunctive relief.

That was clearly the case here. Not only were we never notified of the form of the judgment, we were never apprised of the terms that the judgment would have because the judgment differed at least in one or two key respects from the decision which had been entered.

The decision which was dated January 31, 2000, on its face said that this is to be the decision and judgment of the Court.

Evidently, as we understand now from counsel for respective defendants here, that judgment was rejected sua sponte, for lack of a better word, by the County Clerk's Office without notification to us, and evidently the County Clerk took it upon himself to determine, even

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though Justice D'Emilio said that that was to be his decision and judgment, the County Clerk determined that it would not be the judge's decision and judgment and rejected the judgment without informing us.

We now know from Dr. Feldstein's counsel that he engaged in ex parte communications with the County Clerk and with Mr. Brunjes, Justice D'Emilio's law clerk, in secret, without notifying us, drafted and submitted a new form of a judgment which was then mailed to us.

That's the judgment evidently that was first submitted to the County Clerk's Office, although I note even today the judgment that's on file with the County Clerk is different from the judgment which has been presented to your Honor and the judgment that was presented with notice of entry to us.

THE COURT: What did Justice D'Emilio say about this problem that you outlined concerning the judgment, his original decision, which was a decision and order and he wants that to be entered, the County Clerk refused to accept it for entry, then there was another judgment that was prepared and that you referred to. What does Justice D'Emilio say about this?

MR. DREIER: I don't know, your Honor. There was another judgment that was prepared and filed and sent to us after the fact. There was never any opportunity before

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that or in connection with that to appear before Justice D'Emilio.

THE COURT: Why not? When you received the judgment which differed from the judge's decision of 1/31/2000, why didn't you simply call up and point out that under the CPLR this judgment should have been settled on notice with you and you want to be heard on it?

I assume you did that; but, firstly, did you do it? And if not, why not?

MR. DREIER: Well, we certainly called chambers. It was the practice of Justice D'Emilio never to speak to me on the telephone for any reason whatsoever, nor to allow any communication other than by formal motion. I was told on all occasions nothing would be sent to me or discussed with me other than by formal application. All of our efforts to contact Justice D'Emilio were treated in a different fashion.

Evidently and quite clearly from the contacts made on behalf of counsel for Dr. Feldstein and Mr. Korton, evidently they had quite broad lines to seek ex parte communications with the County Clerk's Office and with Justice D'Emilio's law clerk.

That's not a small matter. We were frustrated at every turn to find out how things occurred, when things occurred. We even called Mr. Smith and asked him, because

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Justice D'Emilio's law clerk would not tell me how it occurred. He literally hung the phone up on me.

I called Mr. Smith and asked how did this occur. Mr. Smith refused to answer my question. I said what was the procedure by which all of a sudden we had a January 31 decision and judgment and now we have a February 8th judgment with no notification. What happened? Did you make an application? Did you communicate with chambers? He said I won't answer.

THE COURT: I don't need this type of detail. This is referred to in your papers. That's one area where you indicate that in your judgment you were not provided with an appropriate opportunity to be heard in the State Court and, therefore, the doctrine of collateral estoppel is not applicable here.

Are there any other ways in which you were prevented from having a full and fair opportunity to be heard?

MR. DREIER: Yes, your Honor. The argument is twofold. The test is to have a full and fair opportunity to be heard and a valid judgment.

The case law which we cited to the Court said in order for a judgment to be accorded collateral —

THE COURT: That isn't my question. That's very nice if you would like to point that out to me, but I

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asked you a very specific question, and the question was in what particulars were you denied an opportunity to be properly heard in the Supreme Court of the State of New York.

You indicated one instance regarding the judgment. My question is are there any other items before we get into the question of the validity of the judgment?

MR. DREIER: Yes, your Honor. We feel we should have had an opportunity to be heard orally. We were never given an audience with Justice D'Emilio.

In fact, to this day, none of the counsel for Ulysses has ever had the opportunity to see Justice D'Emilio on any motion submitted before him. We asked for a conference, we asked for oral argument. All of those applications were denied. Even though we thought there were extraordinary circumstances and irregularities to the procedure and indicated we would like to appear before the Court, we were never given an opportunity to appear before Justice D'Emilio with respect to any of these motions.

THE COURT: Did you avail yourself of the opportunity to make a formal motion before Justice D'Emilio on this question?

MR. DREIER: On the question of what, your Honor?

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THE COURT: What you perceive to be the irregularities in the judgment?

In other words, you said he won't talk to you on the phone, you can't have a conference. You said he required formal application.

My question is what formal application, if any, did you make to Justice D'Emilio to address what you perceived to be a wrong?

MR. DREIER: I may have been misunderstood. What I was referring to is we were denied the opportunity to be heard on the motion for summary judgment and the related motions which were determined by their judgment, not on the judgment itself.

THE COURT: You were not granted oral argument?

MR. DREIER: Correct.

THE COURT: You were permitted to submit papers as well as reply papers and so forth?

MR. DREIER: Yes, your Honor. Finally, we brought to the attention of Referee Araujo, who was about to oversee the discovery process, that there were certain documents which we felt we were entitled to see.

One of the key documents was a document called an agreement to assign and assume entered into between Dr. Feldstein and Mr. Morton, and a second document was a

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lease for the property entered into between Dr. Feldstein and Mr. Morton.

We were denied the opportunity to see those documents by Referee Araujo. Nevertheless, Justice D'Emilio made the determination that the agreement to assign and assume — which we didn't see in full, we saw only the first part of it — it was amended several times. The amendments were produced to us in redacted form. We felt that we should have the opportunity to see the full document.

Justice D'Emilio made the decision that the document was not effectively an assignment notwithstanding the fact that we never saw the full document, and as we understand it he never saw the full document or at least he did not comment on whether or not the full document had been presented to him.

THE COURT: Mr. Dreier, was that point raised to the Appellate Division Second Department?

MR. DREIER: Yes, your Honor.

THE COURT: I assume there's no decision from the Second Department as yet?

MR. DREIER: No. Argument, I understand, will be heard in the first week of September, your Honor.

THE COURT: Thank you, Mr. Dreier.

Now, again, there are extensive papers here. I

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don't see any constructive purpose in going over what's in the papers. If anyone feels that there's something they neglected to put in by inadvertence or something just surfaced, I'll be happy to hear them. Otherwise, I will make the necessary bench decisions based on the submissions of counsel, which I know, parenthetically, are very thorough and well crafted on both sides as far as their respective positions are concerned.

MR. PIERCE: If your Honor please?

THE COURT: Yes, sir.

MR. PIERCE: Counsel indicated that Referee Araujo, appointed by the State Court to govern discovery proceedings, I might add, at counsel's request, determined which papers would be admissible and which would be redacted and which were not.

This is one of the reasons for our motion for sanctions, using this Court to get what the State Court refused to give him. Counsel had those papers. This Court allowed discovery to those documents.

I understand that the only redaction was of an amount of consideration for, and that the legal effect of the paper was not withheld from counsel at all. I believe the complaint, as with many of the complaints, is spurious, sir.

THE COURT: Mr. Pierce, with respect to

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Mr. Araujo and there was a request for documents that pertained to this assignment and lease, is that what it was?

MR. PIERCE: Yes, sir.

THE COURT: At some point it's your understanding that Mr. Dreier has seen both those documents, all the documents?

MR. PIERCE: I think counsel is better equipped to answer that.

MR. SMITH: The critical document was the contract of sale and the initial document with Morton. Those were fully produced.

What they're talking about is subsequent documents that continue the relationship with Morton that were totally irrelevant to the critical issue of whether or not there was a breach of a contract, and so the State Court had that argument. They can raise it on appeal.

Just to answer the question that Mr. Dreier didn't answer, which is did they make a motion to set aside the judgment, which they could have under CPLR 5015, relief from judgment or order, they didn't.

In their appeal brief, point three, they say the Court below failed to comply with 5016(c). What's that section? The failure to entertain a judgment on motion. They got it in front of the Appellate Division Second

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Department.

I must point out to you that under 5019, which is validity and correction of judgment or order, it says a judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers unless a substantial right of a party is affected.

The judgment conforms with the decision. On top of that, it says an appellate court may require the mistake, defect or irregularity to be cured.

If the Appellate Division thinks that something fishy happened, they sure as heck will reverse. Clearly, this is an issue that he had in front of the State Court.

THE COURT: Yes, sir.

MR. DREIER: If I may, let me answer the question that you put to Mr. Smith. You asked him if I had seen the documents that you referred to. He addressed different documents.

You asked if we've ever seen the agreement to assign and assume in its full text. We have never seen the agreement to assign and assume in its full text. The amendments were redacted. There's been a recommendation that the redactions related to payments. Even if that's so, we should see that information.

The answer to your question is to this day we have never seen the amendments in unredacted form to the

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agreement to assign and assume.

THE COURT: Is there anything further? The papers are well done. I understand the issues and I'm prepared to rule on them.

MR. DREIER: Your Honor, if I may be heard briefly, because I know you addressed certain questions to the validity of the judgment.

Frankly, we believe that that is not the main issue. These claims that we assert in this proceeding do not require this Court to overturn, ignore or distinguish this judgment. These claims are different claims from those that were addressed or resolved by the State Supreme Court.

Our complaint raises very serious claims about irregularities and improprieties in the County Clerk's Office in the

Village, and in the manner in which the defendants Feldstein and Morton participated in, if not in fact fostered.

We think our complaint states independent actions for civil rights and due process violations of Ulysses by reason of these irregularities and improprieties. I know the message is in our brief. I want to make sure that the bottom line is understood, which is that regardless of what Justice D'Emilio found on February 8th, 2000, his decision was that the contract between Rounick and

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Feldstein should be enforced. He will direct that specific performance thereafter take place.

There was still a year and a half that preceded that in which Ulysses was the title holder of the property, and a title holder for those 18 months has certain rights.

If the deed is not the indication at any given time as to who holds the right to the property until a judge decides differently, there would be chaos with respect to whose rights should be honored or entertained in a county clerk's office or by the Village police.

At every step of the way here Ulysses was the title holder to this property, but at every step of the way the County, the Village, and these defendants ignored and violated Ulysses' property rights.

I don't understand why the fact that Justice D'Emilio, in February of 2000, decided that something should now take place, which is that specific performance should now be granted on a contract that was entered into years earlier, has any bearing on what Ulysses' rights as the title holder were for the 18 months that preceded that.

Ulysses went to the County Clerk's Office and tried to record its deed in the normal process and the County Clerk rejected it for no reason at all, which

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prejudiced Ulysses.

THE COURT: How did it prejudice Ulysses?

MR. DREIER: Well, because by not having the deed recorded in the normal course, Dr. Feldstein evidently was able to get his lis pendens recorded before Ulysses got its deed.

THE COURT: How did that impact — how does that rise to the level of some type of constitutional claim? What's the difference with a lis pendens?

MR. DREIER. The lis pendens compromises our property rights.

THE COURT: What does that mean? I don't know what that means.

MR. DREIER: We were the title holder. We tried to record our deed on a timely basis. For some reason which we can't understand, the County Clerk rejected the deed. The Clerk took the lis pendens filed by Dr. Feldstein. The date clearly was changed on his lis pendens evidently to allow that lis pendens to be recorded before our deed was recorded.

THE COURT: The effect was it placed a cloud against Ulysses' title?

MR. DREIER: Yes.

THE COURT: That rises to the level of some type of constitutional claim?

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MR. DREIER: It's a property right, your Honor.

THE COURT: Even though Justice D'Emilio has decided, rightfully or wrongfully, that in fact title is vested in Feldstein, not in Ulysses?

MR. DREIER: He decided the property in February 2000 should be transferred to Dr. Feldstein. He made no decision, in his opinion or his judgment, as to what Ulysses' property

rights were for the 18 months that preceded that. He did not say Ulysses had no property rights at any time. He said this contract should now be enforced and the property —

THE COURT: To have a 1983 claim you have to show that some constitutional right is infringed, among other things. So let's assume that the lis pendens was improperly filed. That means that 1983 is somehow triggered without any showing that there was any loss to you. You say it put a cloud. It didn't affect what happened before Justice D'Emilio. It didn't preclude some sale from being consummated. It had no end result.

MR. DREIER: But part of what Justice D'Emilio for that year and a half, we had property rights.

THE COURT: And there was a cloud on the property rights.

MR. DREIER: Yes. Justice D'Emilio can't undo that. Not only that, we were the owner of record. The

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Village, nevertheless, honored either Dr. Feldstein or Mr. Morton as the owner.

In fact, Mr. Morton filed an application with the Village in which he represented that Feldstein was the owner, and the Village was prepared to go forward with his application to demolish the property.

THE COURT: This is all in your papers. It isn't going to make it more accurate or true or any more persuasive by saying it. I read the papers carefully.

MR. DREIER: At least with respect to the claim against the Village, your Honor, the Village Police responded to a non-title holder for a year and a half and evicted the title holder from the property before there was any decision from Justice D'Emilio.

We think that's a violation of our rights, particularly when at least one member of the Village was paid by Dr. Feldstein to do that. We think that's an interference with the property

rights of a title holder, at least before a Court determines otherwise.

THE COURT: If you think that somehow a Village police officer was somehow bribed by somebody to do something that they shouldn't have done, that's something that should be in the District Attorney's hands. You might want to consider that avenue.

You have a right to be here and I'll rule on the

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applications, but I'm not so sure what that means. I don't know if that means that the particular Village police officer may have moonlighted and done some work for Dr. Feldstein. It may mean that, which wouldn't seem to be particularly appropriate, or it may mean that Dr. Feldstein did something supposedly which involved bribery of a police officer. I don't know what you're telling me.

MR. DREIER: What I'm telling you is the police were at the beckon call of Dr. Feldstein. We were the title owner for 18 months. We think it's a deprivation of our property rights.

THE COURT: Thank you.

Let me go through the various items. There's a number of motions, so we have to go through this in some detail and it will take some time.

MR. DREIER: Your Honor, may I make one last request? There's been a motion for sanctions that were submitted yesterday on behalf of Dr. Feldstein.

Insofar as the Court is going to entertain any motion for sanctions, either I would like to be heard on that this morning in addition to the argument that you heard so far, or I would suggest that if you're inclined to entertain any motion for sanctions, that the two motions be heard together. We only got Dr. Feldstein's

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motion yesterday.

MR. SMITH: Your Honor, in following the rules, we merely drafted a motion and suggested they withdraw their complaint. I haven't filed a motion yet and I don't think it's technically made until the time period is up for them to act.

THE COURT: I think Mr. Smith is right on this. I don't think it's appropriately framed at this point. Plus a sanctions motion I consider very serious, and I would like input from plaintiff's counsel on this. I would like written input. I will go through that. I'm not going to rule on the sanctions motions today.

Firstly, by way of some background, the various motions that are made, with the exception of plaintiff's application to amend the complaint, are premised — and for sanctions not yet ripe — are premised on Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

12(b)(1) has to do with the question of whether this Court has subject matter jurisdiction. A recent case by the Second Circuit sets forth the standard and the methodology the Court should employ when confronted with that type of motion. The case is *Makarova -v- United States*, 201 F.3d 110 at 113, Second Circuit 2000.

Basically, the Second Circuit in that instance

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notes that Rule 12(b)(1) is directed to those situations where the Court is devoid of subject matter jurisdiction.

By way of procedure, it indicates that, of course, the Court may look to items outside the pleading to determine whether the Court has subject matter jurisdiction.

And then finally the Circuit underscores for us that with this type of challenge the party asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it in fact exists.

Now, 12(b)(6) is a rule that we see more frequently and that's a motion that's directed to the face of the pleading, and

the Court's function in reviewing such a motion is to assess the legal feasibility of the complaint.

The Court's role is to determine, in essence, if the allegations made were established, whether the cause of action asserted would in fact be established. It's not my role, of course, to make any type of fact finding for purposes of a 12(b)(6) motion.

Moreover, I am required to draw all inferences in favor of the non-moving party. Moreover, I must deem each and every allegation of the complaint for purposes of 12(b)(6) to be accurate and to be on target.

In that regard, however, the Court's not

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required, for instance, under a conspiracy count to accept mere conclusions or bold assertions.

The first question and the first motion that we will address is the motion brought on by Morton and Gibbs. Morton and Gibbs derive their interest in the property through Feldstein.

Now, Morton and Gibbs were not a party to the action before Judge D'Emilio, but of course Feldstein was. In fact, Feldstein was the named plaintiff. The other parties in that action were Rounick and Ulysses.

The Morton defendants actually filed a cross-motion in response to an application by plaintiff for a preliminary injunction, which application was heard before this Court several months ago. The motion is premised on both 12(b)(1) and 12 (b)(6) of the Federal Rules of Civil Procedure.

Before I actually review the grounds that are urged by the Morton defendants, I think it is appropriate to review the amended complaint. That is particularly germane with respect to 12(b)(6), and it's also relevant with respect to 12(b)(1) insofar as issues such as collateral estoppel have been asserted by the moving defendants.

The amended complaint indicates that this is a Federal action to readdress confiscation of its property

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and, of course, the property being discussed is the subject property at 57 West End Road in East Hampton, and the named plaintiff in this case is, of course, Ulysses.

I think that first paragraph of the complaint is germane. It reads: Plaintiff, Ulysses and Company, Inc., Ulysses, brings this Federal action to readdress a confiscation of its property acquired for approximately $5 million without due process and in violation of the constitutional rights of the United States citizens who are its principals.

It's also significant to note that this complaint, which has multiple causes of action, has as its cornerstone, by way of Federal jurisdiction, so-called 1983 action. The other causes of action are here under pendent jurisdiction attached to the 1983 claim.

On page 2 of the complaint there is an indication that all of the defendants — or an allegation — in fact are conspirators, that the individual defendants, aided and abetted by the state and local government defendants, conspired to take property from Ulysses without due process of law.

In paragraph 14 of the complaint there's reference to the judgment that was entered in this case, which judgment was signed by Justice D'Emilio and is dated February 8th, 2000.

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Paragraph 15 synopsizes the relief requested and again makes reference to Title 42 United States Code Section 1983, and again that's the underpinning which brings this case into this Court.

What follows is a long recitation of the history involving the interrelationship between the various parties insofar as it pertains to the 57 West End property.

On page 12 there's a portion of the complaint which is entitled the county clerk's unlawful assistance to Feldstein's wrongdoing, and the paragraphs which follow, which extend from 35 through 41, basically mirror the arguments voiced by Mr. Dreier during oral argument a moment ago.

It talks about an original deed which Ulysses obtained from Rounick, whereby Ulysses purportedly obtained title to the premises.

The document was dated August 25th, 1998. That document was submitted to the County Clerk for recording. The County Clerk or someone in his office indicated that it was illegible, and accordingly it was rejected.

It was returned on September 9th. The problem with readability of the document was corrected and the corrected deed or a clearer deed was submitted and recorded on September 21st, 1998.

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In the meantime, plaintiff Feldstein, plaintiff in the Supreme Court action, commenced an action for specific performance against Rounick for this property.

At the same time he served a notice of pendency indicating that he had a claim for specific performance against this parcel, and the allegation is in the complaint that that notice of pendency was falsified.

There's an indication that the dates were incorrect and some things were whited out and so forth, the bottom line being that the recorded date was plainly falsified.

In paragraph 40 there's an indication that as a result of the foregoing manipulation of the recording and filing dates, Feldstein, with the assistance of the County Clerk, created the false impression that its notice of pendency preceded the transfer of title to the premises to Ulysses.

Moreover, lis pendens is said to have placed a false cloud on Ulysses' title.

Paragraph 48 talks about the parties conspiring to exclude Ulysses from the property, the primary conspirators — perhaps the only conspirators — being Feldstein, Morton, and Morton's sister Gibbs.

On page 21, there's a caption which reads. "The denial of due process by the State Court."

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There's an indication that Justice D'Emilio, in his decision of January 31st, 2000, which is presently under appeal, by the way, with the Second Department of the Appellate Division, violated both the law and the facts of the case, and it was so egregious that apparently it constituted, in plaintiff's view, a denial of due process. That language is contained at paragraph 64.

There's reference to the assignment that was mentioned by Mr. Dreier, and the thought is that the State decision is clearly erroneous because it failed to recognize that a certain assignment, which I'm told and I will accept for present purposes to be accurate, former State Judge, Judge Araujo, did not provide to plaintiff. Moreover, that document was not provided to Justice D'Emilio and, accordingly, his decision was allegedly flawed.

Again, that point is a point on appeal which is before the Second Department.

Paragraph 67 indicates the State Court compounded its denial of due process by awarding Feldstein specific performance as its remedies.

The introductory paragraphs are 1 through 72. The introductory paragraphs are incorporated by reference in each of the causes of action asserted against each of the defendants. When we discuss each of the defendant's

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motions we will return to the corresponding count or counts.

One other item I would like to mention is in the wherefore clause, which has multiple paragraphs. The one designated as a capital B reads as follows:

On count two declaring that all determinations with respect to the ownership, access and control over the premises shall henceforth be made by this Court and the Federal Government and not by the state and local government defendants.

Just as an aside, the State is no longer a party to the action, having been dismissed on consent. Justice D'Emilio is not a defendant in the action.

Suffolk County does not have the authority to make decisions that affect real property as far as the question of where ownership rests, nor does the Village of Southampton.

But, in any event, against that backdrop, to return to the motions made by the defendants Morton, the motion that's under discussion is the motion to dismiss each of the causes of action that is asserted against defendants Morton and Gibbs.

The basis for the motion is essentially multi-pronged, and includes the following.

Firstly, the action must be dismissed under the

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Rooker-Feldman doctrine. Additionally there's a claim that the doctrines of res judicata and collateral estoppel preclude the present action from proceeding in this forum; and, moreover, *Younger -against- Harris* dictates that this matter should be dismissed vis-a-vis these two moving defendants. These arguments are in the disjunctive.

The Rooker-Feldman doctrine is the first one that's raised, and that's under 12(b)(1). That's a claim that this Court lacks jurisdiction.

In that regard, the Court is required to focus upon the pleading and, of course, I'm permitted to go outside the pleading for purposes of 12(b)(1) and to determine what I'm being asked to do.

Am I being asked to review the legitimacy of the State Court determination? I'm also required, as part of that process, to determine whether the constitutional claims that are advanced here through the 1983 claim are inextricably interwoven with the States Court's decision.

Now, if the answer to either of those questions is yes, then movant is correct, I do not have subject matter jurisdiction.

Movants have cited a number of cases which are very instructive on this point. Firstly, of course, the Rooker case which was decided in 1923 by the Supreme Court and which bears the full title of *Rooker -against-*

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Fidelity Trust Company, 263 U.S. 413, is obviously germane and bas been reviewed.

Now, the other part of the Rooker-Feldman doctrine requires reference to a case decided 60 years after Rooker by the Supreme Court which bears the caption or the title *District of Columbia Court of Appeals-v- Feldman*, 460 U.S. 462, 1983.

There's a case entitled *Vasile -v- Dean Witter Reynolds*. I think that was a case by Judge Seybert here in the Eastern District of New York, decided in 1998. That case was subsequently affirmed. I don't have the cite for the affirmance, but it was affirmed, I believe, in a summary order.

As noted by Judge Seybert in that case: "A plaintiff may not institute an action in Federal Court that indirectly changes the holding or decision of a State Court by raising issues in Federal Court that are inextricably interwoven with the State Court's decision."

The concept of inextricably interwoven or intertwined is obviously significant for present purposes.

Justice Marshall, concurring in the case of *Pennzoil -against-Texaco, Inc.*, 481 U.S. 1 at page 25 in 1987, provided some guidance in that regard.

He explained: A Federal claim is inextricably

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intertwined with a State Court judgment if the Federal claim succeeds only to the extent that the State Court wrongly decided the issue before it where Federal relief can only be predicated upon a conviction that the State Court was wrong, it is difficult to conceive the Federal proceeding as, in substance, anything other than a prohibited appeal of the State Court judgment.

Juxtapositioning Justice Marshall's explanation and the other cases cited, including another case I'll mention that was provided by movant's counsel, it's *Bal -v- New York City Loft Board*, a decision reported in the July 13, 2000, New York Law Journal at 37.

That's a decision by Judge Koeltl of the Southern District of New York. He goes through the Rooker-Feldman doctrine and explains it.

Another case which bears mention is a case by the Second Circuit. I think it was written by Judge Walker, speaking for the panel. It's *Moccio -v- New York State Office of Court Administration*, 95 F.3d 195, Second Circuit 1996.

Now, here the gravamen of plaintiff's complaint, prescinding for the moment from the question of the pendent jurisdictional claims, is quite clearly that Justice D'Emilio was wrong.

Thus, we hear that Armand Araujo, who was

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appointed to supervise discovery, made an error purportedly with respect to turning over certain documents which documents, in plaintiff's view, would indicate that plaintiff Feldstein, plaintiff in the State action, breached the contract via an assignment to the Morton defendants.

We're also told that because of the purported error by Judge Araujo, that the decision of Justice D'Emilio is wrong.

Now, to prevail on that claim or any of these claims, basically this Court would be required to say that Justice D'Emilio dropped the ball.

There is a mechanism for a federal final review of a State Court decision, but that authority and that responsibility rests with the Supreme Court of the United States, not with this Court.

The key part of this analysis, I think even for the purposes of 12(b)(1), is to look at the complaint as drafted and then to look at the decision of Justice D'Emilio which was decided in January of this year. Clearly, I am being asked to review the work product of Justice D'Emilio.

Now, there is an available mechanism obviously to review the work product of Justice D'Emilio, and that's via an appeal to the Second Department. There is such an

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appeal pending.

I have been furnished by the movants with information concerning the appeal to the Second Department. In the important particulars, that appeal basically raises the same issues that are before me.

But the point is this belongs in the State Court, not here. More appropriately said, under the Rooker-Feldman doctrine I don't have subject matter jurisdiction.

Now, there has been mention about this judgment, so I'll mention that as well. Apparently what happened is that Justice D'Emilio, in his January 31st, 2000, decision, indicated that the decision would constitute both the judgment and decision of the Court when the successful party in that litigation — that would be the plaintiff in the Supreme Court — endeavored to have that decision and judgment entered. The County Clerk said they needed a separate judgment and, accordingly, at that point a judgment was prepared.

Now, I have looked at the judgment and I have looked at the decision. The decision directed that — this is the decision

of Justice D'Emilio — he indicated that, number one, Dr. Feldstein did not breach the contract; number two, that Mr. Rounick had breached the contract of sale which would have resulted in title being

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transferred from Rounick to Feldstein. He also directed that the plaintiff in that action, Dr. Feldstein, was entitled to specific performance.

The point is, Justice D Emilio, rightfully or wrongfully, constitutionally or unconstitutionally, decided that case, and it is clear in the Supreme Court's decisions it isn't a question of whether the State Court was correct or incorrect. That's not the issue.

So now the question about when the judgment was actually filed. Apparently what happened is — and I'm construing all this most favorably to plaintiff — apparently what happened is counsel for the Morton defendants prepared a proposed judgment. It was submitted directly to Justice D'Emilio and he signed it. So that is the judgment in the case, what Justice D'Emilio signed.

Now, if there's any irregularity in the judgment, if the judgment departs from Justice D'Emilio's decision, and I don't think it does in the important particulars for present purposes; i.e., who is the owner of the property. In that regard, they're identical. The owner of the property, according to Justice D'Emilio, is Dr. Feldstein, period. But to the extent there is some difference between the judgment as filed and the judgment or the decision of Justice D'Emilio, that's a matter that can be addressed. There's a mechanism for that to be addressed.

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Now, Mr. Dreier indicates Justice D'Emilio does not entertain — on occasion, at least in his situation apparently, in this case invariably – oral argument. It's difficult to reach him on the phone, but he does entertain applications, which, of course,

he must. If anybody wants to make an application by way of motion, they make it and he will decide it.

To the extent there's an irregularity in the judgment, that should have been addressed in the State, presumably to Justice D'Emilio. It may even be — and I don't know — that the Appellate Division might have some control over that. Mr. Smith has voiced the view, and I think he's absolutely right, if there is some fundamental irregularities which taint or compromise the legitimacy of the State proceeding, the Appellate Division will reverse the judgment.

Now, also, as we all know, there is a final judgment here. There's a final judgment for purposes of the Rooker-Feldman doctrine even though Justice D'Emilio's decision is presently under appeal. There are a host of cases that stand for that point, and it's not subject to debate.

Now, independently of the Rooker-Feldman doctrine, there's also the question of res judicata and collateral estoppel. Res judicata is at least

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traditionally viewed as claim preclusion, and usually when we think of collateral estoppel we think of issue preclusion.

Now, in this case it's true that the Morton defendants were not parties to the State action. It is also true, however, that they clearly are in privy to Dr. Feldstein. As a matter of fact, they derived their title through him, or their interest in the property through him.

Collateral estoppel — forgetting about res judicata — there's no question there's collateral estoppel effect to this judgment reached by Justice D'Emilio. That's another ground upon which — withdrawn.

The first issue — the first question involves 12(b)(1). Under 12(b)(1), this Court is without subject matter jurisdiction.

Now we're going to a separate ground. Under 12(b)(6), does the complaint state a cause of action upon which relief can be granted against either or both of these defendants.

Now, in that regard the answer again would be no, and the reason for that would be the collateral estoppel. In *Younger -against- Harris* — that's a third ground and it need not be addressed and will not be addressed in view

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of what's been said previously.

The application by the Morton defendants to dismiss the 1983 claim is granted. It's granted on the basis that the Federal claim which is asserted against them is inextricably intertwined with the State Court judgment rendered by Justice D'Emilio and which is presently under appeal to the Second Department.

Now, with respect to the other claims against this defendant, they again are State claims which are attached to the Federal claim. The Morton defendants through their attorneys have attacked each of those claims, and I think actually quite well. I'm not going to wade through each of them. What I will do is dismiss them on grounds there's no reason for me to retain these purely State claims in view of the fact that the 1983 action is inappropriately before me and cannot be considered.

Now, there's other issues — we can spend all day on this — the question of conspiracy. Supposedly, these defendants are members of a conspiracy. That would be under 12(b)(6). Conspiracy has to be alleged with a certain level of specificity. I think that the allegations here fall short of the mark. I'm not even going to go down that road because it's unnecessary.

On the 12(b)(6), on the face of the pleading it's clear there's collateral estoppel. The face of the

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pleading refers at great length, and I think it's incorporated as an exhibit to Justice D'Emilio's decision.

Therefore, the Court has looked at the decision. The end result of the process is that collateral estoppel indicates that

there is no viable cause of action that's been stated as against these defendants and, accordingly, and alternatively, it is dismissed under 12(b)(6).

Now, the motion by the defendant Feldstein in very well crafted papers have set forth a multiple attack on the complaint insofar as it pertains to Dr. Feldstein, and many of these claims are stated in the alternative.

As indicated, the Morton and Gibbs defendants derived their interest in the property through Feldstein. The same thing that was said previously concerning the Rooker-Feldman doctrine's applicability to this case is equally applicable to Dr. Feldstein.

So, accordingly, the claims against Dr. Feldstein are also dismissed on the grounds this Court lacks subject matter jurisdiction. That being the case, I'm not going to go through the other arguments that are raised. I will note, however, and I do rule, that with respect to the State claims which are attached to the Federal claim, that they are dismissed in the exercise of my discretion. There's no valid reason for the Court to retain

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jurisdiction over those claims in this action, which is in its infancy, when the Federal predicate is fatally flawed.

Next, I'll address the motion made by the Village of East Hampton. With respect to the Village of East Hampton, Mr. Dreier has mentioned that some of the conduct which is alleged against the Village of East Hampton predates Justice D'Emilio's decision, and such conduct occurred at the time when title was in Mr. Rounick.

Now, the motion of the — I will step back for a moment. With respect to Dr. Feldstein, we addressed the 12(b)(1) motion, and that's the one that has to do with the Rooker-Feldman doctrine. We've also discussed the pendent claims. We haven't discussed collateral estoppel.

I will incorporate by reference what I said with respect to the Morton defendants vis-a-vis Dr. Feldstein. The doctrine of collateral estoppel is clearly applicable here. There was an

issue that was decided by Judge D'Emilio. It is the central issue in this case. That determination is entitled to the collateral estoppel effect or issue preclusion effect.

In that regard I find -- and this is true not only of Dr. Feldstein's application but also the Morton defendants -- that notwithstanding Ulysses' protestations

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to the contrary, there's no doubt that Ulysses was provided with a full opportunity to present these issues before the State judge, and to the extent they feel the State court erred, to raise it in the Appellate Division.

He complains about the decision during discovery. That's an error that is readily correctable within the State system. It's not something that would permit a party to come to a Federal Court to basically overrule the determination of a discovery referee.

To return to the situation concerning the Village of East Hampton, basically what happened is that individuals affiliated with the present plaintiff endeavored to gain access to the property, that being 57 West End Road, and the allegation is — and, of course, the allegation is accepted as true — that they were precluded from gaining entry to the property, compliments of the intervention of a Village police officer.

As a result of that — and again, some of the conduct predates Justice D'Emilio's decision — as a result of that conduct, the Incorporated Village of East Hampton has been sued.

We do know, as pointed out in the Village's memorandum of law, that the Village is not responsible for the acts of a police officer under these circumstances under the doctrine of respondeat superior.

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Rather, for the Village to be held responsible, there must be some linkage between the conduct and a practice or custom of the Village or a policy of the Village which permitted this

to happen. Absent from the cause of action asserted against the Village is any reference to a policy, practice or custom.

So for that reason there clearly — the pleading is clearly insufficient under 12(b)(6) to withstand scrutiny vis-a-vis the Village.

Now, also, there is an allegation here concerning a conspiracy. Supposedly, the Village is one of the conspirators who endeavored or had as a goal depriving Ulysses of due process concerning the subject property.

Again, there are specific requirements that must be met when a conspiracy is alleged. Those standards have not been met, so on that ground, which is a disjunctive ground, the pleading fails to pass muster under 12(b)(6).

Now, another issue concerns whether this Court has subject matter jurisdiction. To the extent that the conduct is said to predate the determination by Justice D'Emilio, arguably the Court may have subject matter jurisdiction but that's an argument that doesn't have to be addressed or resolved.

It certainly would be true for any conduct that postdates that decision that the Court lacks subject

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matter jurisdiction, because for me to find that the police officer acted improperly would require a determination that Ulysses has a property right in the subject premises, which is completely contrary to what Justice D'Emilio decided.

In any event, and to kind of synopsize this clearly, the 1983 claim against the Village does not pass muster because it does not allege that the activities of this Village police officer was in any way attributable to a policy, practice or custom of the Village. On that ground it clearly falls.

The conspiracy is also improperly alleged, which is part of the same cause of action. I'm not going to address the other two grounds.

The last of the motions to dismiss involve the County of Suffolk and the individually named defendant Edward Romaine, who is the County Clerk of the County of Suffolk.

Firstly, as far as the County of Suffolk is concerned, when plaintiff discontinued against the State or did not oppose the State's motion to dismiss, it would seem they probably should have taken the same position vis-a-vis the County of Suffolk.

For the same reasons articulated with respect to the Village of East Hampton, not being responsible for the

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purported acts of its police officers, the County of Suffolk is not responsible under respondeat superior for the acts of defendant Romaine.

Moreover, as to this cause of action — and again, I'm doing this under 12(b)(6) — there is no allegation that, in fact, the County Clerk acted pursuant to a policy or custom of the County of Suffolk. The action against the County of Suffolk is dismissed.

Also, under 12(b)(6), there's a pleading deficiency, and this is alternatively regarding the purported conduct of the defendant Romaine.

For 1983 to come into play, obviously one of the elements of the cause of action is that there's some constitutional right that was compromised.

In this instance, the constitutional right asserted is the taking of property without due process of law.

However, juxtapositioning of what the County Clerk supposedly did against what's required to adequately allege a 1983 action indicates that his conduct — assuming, arguendo, it's true, as I must for purposes of 12(b)(6) — did not lead to the plaintiff Ulysses having a constitutional right compromise.

There's an indication that it clouded the title. There's no indication that that somehow caused some loss

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of property to Ulysses.

Similarly, the situation about the recording of deeds and so forth, this isn't a situation where one individual reached the courthouse before another and filed a deed, where the first individual might have some type of priority as to ownership of the property. The ownership of the property here was determined compliments of Justice D'Emilio.

So what I'm saying is even if, arguendo, I accept that the County Clerk was involved in some type of impropriety in the recording of these various documents, there's no identifiable constitutional right that's been identified as being compromised.

Also, with respect to the conspiracy assertion against this defendant, the pleading does not pass muster. It doesn't have the requisite specificity concerning that allegation. There are other grounds that have been advanced on behalf of both the County and the defendant Romaine in seeking the dismissal of this pleading.

However, for the reasons indicated, the causes of action against the two named defendants are dismissed and, accordingly, the other grounds advanced for dismissal will not be addressed.

There's also a point which will be mentioned, and

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it's purely in the disjunctive, but it would appear that to the extent any effort is made to link the alleged irregularities perpetrated by the County Clerk to the determination that Dr. Feldstein is entitled to specific performance of his contract to purchase this property, the Rooker-Feldman doctrine does come into play.

For me to find that the conduct, to the extent that nexus can arguably be established, somehow defeated the claim of Mr. Rounick, I would be calling into play the determination of Justice D'Emilio.

Justice D'Emilio has said that this property rightfully belongs to Dr. Feldstein. In any event, that last argument is really a disjunctive argument, and it need not be further pursued.

So the claims against that defendant or those defendants, the County of Suffolk and Edward Romaine as the County Clerk of Suffolk County, are similarly granted.

There's another application here and this is an application to amend the complaint. The complaint has been amended once.

The Court well recognizes that applications to amend should be freely granted. There's a very liberal standard in that regard. However, in some instances an application to amend a complaint would be denied where it

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appears that any amendment would essentially be a futile act.

As an aside, I do note that in this case there's been a great deal of legal work spent by plaintiff as well as each of the defendants in this Court, notwithstanding the fact that this Court lacks subject matter jurisdiction.

The point is that the legal fees are escalating, the costs to the parties are escalating, the time devoted to what appears to be a futile quest is escalating.

Notwithstanding that, the fact of the matter is that these type of applications should be granted liberally and typically will be granted, and I almost invariably grant them.

To return to the subject of a futile amendment, that issue is discussed in a recent case of the Second Circuit which bears the title *Cuoco against Mooritsugu*, 2000 Westlaw 1041227, July 28th, 2000, Second Circuit.

Here, plaintiff's counsel has indicated in his letter of June 9th, 2000, more particularly on the fifth page, I am asked to provide leave to amend its complaint "to show the invalidity

of the February 8th judgment and thereby further demonstrate the jurisdiction of the Court to entertain Ulysses' claim."

This question of the impropriety of the June 8th

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judgment has already been discussed. The judgment is presumptively valid, it's signed by a Justice of the Supreme Court and happens to be on appeal to the Second Department. The mere fact that there may be some irregularity in the judgment, the mere fact there may be some error in the underlying decision which prompted the judgment, does not derail the Rooker-Feldman doctrine.

So, based on the proffer that's been made as to what would be the purpose of the amendment, the application or the motion to amend the complaint is denied.

There's also another application which is not fully framed. Nonetheless, in the exercise of my discretion, I will rule on it now.

It's an application brought on behalf of the defendant Feldstein, and basically what it asks is that this Court issue an injunction which would preclude Ulysses from bringing any further actions in the Eastern District of New York and, probably even broader than that, in any federal district court concerning the ownership of the subject property.

I have reviewed the cases cited and I'm going to decline to grant that application. Typically, although not invariably, such orders are entered when there have been multiple frivolous suits that have been filed by a

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litigant.

In one of the cases which was before the Second Circuit, the name of which escapes me, the litigant had brought 250 actions and appeals in various courts. In Judge Seybert's case, the case mentioned earlier, I think there were three or four that were brought.

In my judgment the issuance of such an extreme order, and the order is basically — I misstated it earlier. Basically the application is you can't bring any suit in either the Eastern District of New York nor arguably in any other Federal District without prior approval of me.

I have a certain amount of discretion in that regard, and I'm going to decline to grant that application even on the presentation which has been made, which is obviously one sided because the plaintiff never responded to it, to my knowledge. It doesn't suffice, so I'm not going to grant that.

The only other item we have left is the question of sanctions, and Mr. Smith indicated the posture of that. So it is not framed. I think that's an important matter.

Am I looking at the wrong man? Mr. Pierce, this is your application?

MR. PIERCE: We have one that is framed and the

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time constraints have been honored and the motion filed. He's had notice for over a month, but there's been no response. There's a second one that isn't perfected.

THE COURT: There's two motions for sanctions. I think a sanction motion is of great importance. I think it's very important that any time such an application is made that the target of the application have an opportunity to fully respond, both legally and factually, and so I'm going to defer on both of them.

The one that was made by Mr. Pierce, Mr. Dreier, I don't think you answered that, have you?

MR. DREIER: Your Honor, we intended in part for the memo in opposition to address the merits. I would like the opportunity to respond now that you ruled on the motion.

THE COURT: How much time do you want on it?

MR. DREIER: There's also the motion that was made by Mr. Smith, and I would like to respond together. I got that motion yesterday. Can I have three weeks, your Honor?

THE COURT: That's fine. Movant gets the last word. Today is August 1st. We will expect Mr. Dreier's papers in opposition by August 22nd. I expect papers from the movants, to the extent they deem a reply is required, by August 31st.

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MR. PIERCE: If your Honor please, may I stretch that a bit? I think we're working into the Labor Day weekend there, so another few days would be very helpful.

THE COURT: I have no problem with that.

I will give Mr. Dreier a little more time and we will work from there. You asked for three weeks. We will put it over to the 29th for your papers and then the reply papers by the defendants will be September 15th.

I'm going to need orders on this. I would like each of the defendants — the defendants have prevailed on each of their applications, so what I would ask the respective defense counsel to do is to prepare proposed orders, settle them on notice so Mr. Dreier sees them, and you can make them fairly straightforward.

We have a full record of what transpired today. You can just indicate the nature of the motion and granted. There shouldn't be any problem with the orders because they are relatively straightforward. If there is any problem, not to what brought them about, but the verbiage, make sure it's consistent with the bench decision, then counsel can arrange for a conference call rather than drag everybody back in here.

I don't think there's anything further that we have to do today. I do note that all of these rulings, to the extent they're adverse to the plaintiff, is over the

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plaintiff's strenuous objection, so your position is well noted.

Anything further we have to do? If not, we will stand in recess. Thank you very much, counsel.

(Proceedings concluded.)

Appendix L

SHORT FORM ORDER

INDEX NO.: 0020970/1998
SUBMIT DATE: 4/18/2001
MTN. SEQ.#: 013; 014

SUPREME COURT — STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 4/13/2001
MOTION NO.: 013-MOT D
014-XMD

X

GARY FELDSTEIN,

Plaintiff,

– against –

JACK ROUNICK and
ULYSSES I & COMPANY, INC.,

Defendants.

X

Upon the following papers numbered 1 to 75 read on this motion for an order vacating the judgment dated 2/7/00 (D'Emilio, J) and other relief, and cross-motion for an order directing the Sheriff of Suffolk County to execute a deed; Notice of Motion/Order to Show Cause and supporting papers 1-29; Notice of Cross-Motion and supporting papers 30-48; Answering Affidavits and supporting papers 49-55; 56-58; 59-66; Replying Affidavits and supporting papers 67-75; Other _____; and counsel for plaintiff, defendant Ulysses and non-party Suffolk County Sheriff having appeared before this Court on April 18, 2001 and having presented oral argument in favor and opposed to the respective applications, it is

ORDERED that this motion by defendant, Ulysses I & Company, Inc. (Ulysses), to the extent it seeks an order pursuant to CPLR 2221 granting leave to renew the prior cross-motion by plaintiff, Gary Feldstein, for an order granting summary judgment in his favor is denied; and it is further

ORDERED that to the extent the motion by defendant Ulysses seeks an order pursuant to CPLR 5015(a)(2) and (3) vacating the prior judgment of the Court (D'Emilio, J.) dated February 7, 2000, such application is granted for reasons herein set forth and said judgment is hereby recalled and vacated; and it is further

ORDERED that the plaintiff shall submit on notice a proposed judgment with supporting papers no later than June 4, 2001, and each of the defendants, should they deem it appropriate, shall submit on notice a proposed judgment with supporting papers no later than June 20, 2001; and it is further

ORDERED that the cross-motion by plaintiff for an order directing the Sheriff of Suffolk County to execute a deed to the subject premises is denied; and it is

ORDERED that in all other respects the applications are denied.

By Order of the Hon. Gerard D'Emilio dated January 31, 1999, a motion by defendant, Ulysses I & Company, Inc. (Ulysses) for summary judgment and a cross-motion by co-defendant, Jack Rounick, for dismissal of the complaint were denied and the cross-motion by plaintiff, Gary Feldstein, for summary judgment in his favor was granted. The determination of the Court was made upon the following facts: On or about May 24, 1993, Feldstein entered into a written contract to purchase certain real property from Rounick for a sales price of $7,000,000. The sales contract between Rounick and Feldstein contained a schedule of payments to have been made by Feldstein and included a provision that, "Feldstein will continue to pay for the insurance on the house as well as all related expenses such as, fuel, electric, trash removal, phone, gardening, pool maintenance, cable, water, etc." Such contract was amended by written agreement dated July 4, 1993

and again by written agreement dated May 30, 1997. The second amendment to the contract established a schedule under which the sale price of $7,000,000 was to be paid in installments. The parties acknowledged in the agreement receipt of $1,800,000 and required payments of $25,000 per month commencing June 1, 1997 through and including September 1, 1998, with an additional $1,300,000 to be paid "on or about October 1, 1998 (the 'Scheduled Closing Date')." The second amendment also gave Feldstein an option prior to the "Scheduled Closing Date" of October 1, 1998 to pay Rounick $1,200,000 and require an existing mortgage on the property to be satisfied in return for transfer of title, and reduced the last payment due on October 1, 1998 to the amount of $100,000. Under the terms of the second amendment, real estate taxes levied against the property were to be paid by Feldstein beginning October 1, 1997.

On or about August 10, 1998, Feldstein entered into a written agreement with Peter Morton under which it was agreed that Feldstein would assign to Morton his contractual right to purchase the East Hampton premises for a purchase price of $9,700,000. Thereafter, by letter dated August 20, 1998, Feldstein asked Rounick either to accept a mutually agreeable amount representing the present discounted value of future payments to have been made under the agreement or to accelerate the closing of title to August 28, 1998 under the terms of the second amendment to the agreement. Feldstein was advised by letter, however, that Rounick had sold the property to Ulysses on August 24, 1998. By the filing of a summons and complaint on August 31, 1998, Feldstein commenced this action against Rounick and Ulysses seeking specific performance of the contract. While Feldstein also advised Rounick and Ulysses by letter dated September 3, 1998 that he wished to accelerate the closing of title under the terms of his contract, subsequent efforts to do so proved fruitless.

By short form order dated January 31, 2000, it was determined by the Court on plaintiff's cross-motion for summary judgment that Feldstein had demonstrated his readiness, willingness and ability to complete the purchase of the property

through his submission of the affidavit of a managing partner of Decten Fund, L.P., in which it was indicated that Feldstein maintained an account balance in the amount of $2,632,185. The Court further held that Rounick breached his contract with Feldstein by selling the property to Ulysses and by encumbering the property with a $3,000,000 purchase money mortgage.

A judgment dated February 7, 2000 and filed in the office of the Clerk of the County of Suffolk on February 8, 2000 directed Rounick and Ulysses to "specifically perform the contract entered into with the plaintiff on May 24, 1993, as amended by amendments dated July 4, 1993 and May 30, 1997" and "execute all documents necessary to transfer to plaintiff good and marketable title to the property located at 57 West End Road, East Hampton, New York . . ." Under the terms of such judgment, Feldstein was to tender the balance of the purchase price simultaneously with the delivery of the deed and, upon defendants' failure or refusal to execute the deed and transfer title, the Sheriff was directed to execute a deed for the premises. An appeal of the order and judgment was thereafter taken, and by Decision and Order dated October 10, 2000, the Appellate Division, Second Department, affirmed the judgment, noting the following: "The record demonstrates, as a matter of law, that the plaintiff buyer was ready, willing, and able to perform his obligations under the contract, even though his tender of performance was excused by the defendant seller's anticipatory breach . . ."

Defendant Ulysses now moves for an order vacating the judgment dated February 7, 2000 (D'Emilio, J.) pursuant to CPLR 5015(a)(3) on the ground that it was submitted *ex parte* and, therefore, that it was obtained as the result of misconduct of an adverse party. It is not disputed in the record before this Court that such judgment granting equitable relief was obtained *ex parte* and, as such, it was not entered in accordance with CPLR 5016(c), since the defendants were not given an opportunity to be heard on its contents. Furthermore, in view of the representation in defense counsel's affirmation that, "since August 1988, Ulysses has been paying the real estate taxes and, until recently, all utility bills . . ." and the continued

occupancy of the premises by the plaintiff's assignee, equity demands that appropriate adjustments be made at this time (*see*, e.g., *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 196 AD2d 564, 601 NYS2d 334 [2d Dept. 1993], appeal denied, 83 NY2d 756, 637 NE2d 277, 614 NYS2d 386 [1994]). Courts have long recognized that a court granting the equitable remedy of specific performance will, so far as possible, place the parties in the same situation as they would have been had the contract been performed according to its terms (*4200 Avenue K Realty Corp. v. 4200 Realty Co.*, 123 AD2d 419, 506 NYS2d 723 [2d Dept. 1986], appeal dism'd, 69 NY2d 944, 509 NE2d 351, 516 NYS2d 656 [1987] [citations omitted]).

Insofar as movant seeks an order granting leave to renew the prior application by plaintiff, this Court is mindful that a motion for leave to renew generally must be based upon additional material facts which existed at the time the prior motion was made but were not then known to the party seeking leave to renew and, therefore, not made known to the Court (*Morrison v. Rosenberg*, __AD2d__, 717 NYS2d 354 [2d Dept. 2000], citing *Shapiro v. New York*, 259 AD2d 753, 687 NYS2d 401; *see also LaRosa v. Trapani*, 271 AD2d 506, 706 NYS2d 911 [2d Dept. 2000]). A review of movant's papers reveals that they are completely devoid of any proof in evidentiary form sufficient to create an issue of fact so as to alter the result of the underlying summary judgment motion. Moreover, while movant claims that a trustee's allegations of fraudulent transfers of money by plaintiff which are asserted in a complaint filed in connection with a bankruptcy proceeding constitute new facts justifying renewal of the motion, such allegations, without more, would not have changed the outcome of the summary judgment application. Even if such allegations were accepted as true and the funds allegedly obtained through fraud were deducted from the $2,632,185 balance in plaintiff's Decten Fund at the time of the closing, such evidence is insufficient to raise an issue of fact against plaintiff's proof that he was a ready, willing and able buyer. Accordingly, to the extent movant seeks leave to renew the underlying sum-

mary judgment application, such application is denied in its entirety.

DATED: 14 MAY '01

/s/ John J.J. Jones, Jr.
HON. JOHN J.J. JONES, JR.
J.S.C.

TO:

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Appendix M

AT IAS part 33 of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse, 235 Griffing Avenue, Riverhead NY on the 7th day of February, 2000.

PRESENT: HONORABLE GERARD D'EMILIO
Justice

FILED
FEB 08 2000
EDWARD P. ROMAINE
CLERK OF SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

GARY FELDSTEIN,

Plaintiff,

– against –

JACK ROUNICK and
ULYSSES I & COMPANY, INC.,

Defendants.

JUDGMENT

Index No. 98-20970

The plaintiff, Gary Feldstein, having cross-moved for an Order pursuant to CPLR 3212, directing the entry of summary judgment in favor of the plaintiff and against the defendants Jack Rounick and Ulysses I & Company, Inc., and the issues having come to be heard by IAS Part 33 of this Court, Suffolk County, at the Courthouse, 235 Griffing Avenue, Riverhead, New York, before Justice Gerard D'Emilio on April 5, 1999, and the court, after due deliberation thereon, having made and signed a written decision dated January 31, 2000, granting judgment in favor of the plaintiff, Gary Feldstein, and awarding specific performance as against the defendants demanded in the complaint, and the aforesaid described decision of the Court having been duly filed herein, it is now

ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendants, Jack Rounick and Ulysses I & Company, Inc., to the extent hereinafter set forth, on the merits; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Jack Rounick and defendant Ulysses I & Company, Inc. shall specifically perform the contract entered into with the plaintiff on May 24, 1993, as amended by amendments dated July 4, 1993 and May 30, 1997 (collectively, the "Contract"), and execute all documents necessary to transfer to plaintiff good and marketable title to the property located at 57 West End Road, East Hampton, New York (District 0301; Section 015.00; Block 05.00; Lot 008.000), free and clear of all encumbrances on ~~February 18~~ March 10, 2000 at the offices of Stroock & Stroock & Lavan, LLP, the attorneys for the plaintiff, at 10:00 a.m. in the forenoon; and it is further

ORDERED, ADJUDGED AND DECREED that simultaneously with the delivery of the deed herein, the plaintiff shall tender the balance of the purchase price in accordance with the Contract, and it is further

ORDERED, ADJUDGED AND DECREED that if the defendants shall fail or refuse to execute the deed and transfer good and marketable title, free and clear of all encumbrances by 5:00 p.m. ~~February 18~~ March 10, 2000, in addition to plaintiff's right to proceed by way of contempt proceedings to enforce this judgment and its provisions and any other lawful means available, the Sheriff is directed to execute a deed for the premises described in the Contract; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff shall have execution against the defendant Jack Rounick who resides at The Jockey Club, 11111 Biscayne Boulevard, Building No. 2, Miami, Florida 33181 and Ulysses I & Company, Inc., c/o Potter Anderson & Corroon, 1313 N. Market Street, Wilmington Delaware 19899.

ENTER.

/s/ Gerard D'Emilio
J.S.C.

HON. GERARD D'EMILIO

GRANTED
FEB 7 2000
Edward P. Romaine
Clerk of Suffolk County

FILED
FEB 08 2000
Edward P. Romaine
Clerk of Suffolk County

Appendix N

SUPREME COURT — STATE OF NEW YORK
I.A.S. PART 33, SUFFOLK COUNTY

Present:
Hon. GERARD D'EMILIO

Index No. 20970/1998

MOTION DATE APRIL 5, 1999
MOTION SEQ. NO. 005; 006; 007; 008; 009
MD; MD; MD; MG; MG

GARY FELDSTEIN,
Plaintiff,
– against –
JACK ROUNICK and
ULYSSES I & COMPANY,
Defendants.

PLTF'S/PET'S ATTY:

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DEFT'S/RESP'S ATTY:

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PROSKAUER ROSE LLP
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New York, New York 10036-8299

ESSEKS, HEFTER & ANGEL, ESQS.
Co-Counsel for Deft. ULYSSES

108 E. Main Street — P.O. Box 279
Riverhead, New York 11901

Upon the following papers numbered 1 to 47 read on these motions by defendants and Plaintiff, for various reliefs

Notice of Motion/Order to Show Cause and supporting papers 1-3; 6-8; 19-20; 21-22; [illegible]

Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13-14; 15-16; 23-24; 45-46; Replying Affidavits and supporting papers 25-26; 30-31;

Memorandum of Law 4-5; 11-12; 17-18; 32-33; 34-35; 36-37; 38-39; 40-41; 42; 47; it is

ORDERED, that this motion by defendant, Ulysses I & Company, Inc., [Seq. 005], for an Order pursuant to CPLR 3211 (a)(1) and (7) dismissing the Complaint or, in the alternative, pursuant to CPLR 3211(c) and CPLR 3212, directing the entry of summary judgment in favor of moving defendant and against the plaintiff is denied; and it is further

ORDERED, that the motion by defendant, Ulysses I & Company, Inc., brought by Order to Show Cause granted April 12, 1999 [D'Emilio, J.], [Seq. 006], for an Order (i) pursuant to CPLR 3212, directing the entry of summary judgment in favor of moving defendant and against plaintiff on moving defendant's counterclaim for use and occupancy of the subject premises in the amount of $369,593.08; (ii) ordering the immediate removal of the plaintiff from the premises in the absence of such payment; and (iii) pursuant to CPLR 6514, vacating the plaintiff's notice of pendency or, alternatively, pursuant to CPLR 6515, requiring an undertaking from plaintiff in the amount of at least $2,000,000.00 as a condition for continuation of the notice of pendency is denied; and it is further

ORDERED, that the cross-motion by defendant Jack Rounick, [Seq. 007], for an Order pursuant to CPLR 3211(a)(1) and (7), dismissing the Complaint or, in the alternative, pursuant to CPLR 3211(c) and CPLR 3212, directing the entry of

summary judgment in favor of moving defendant and against the plaintiff, is denied; and it is further

ORDERED, that the motion by defendant, Jack Rounick [Seq. 008], for an Order permitting defendant Rounick to remove from the premises located at 57 West End Road, East Hampton, New York, all furnishings belonging to him, is denied; and it is further

ORDERED, that the cross-motion by plaintiff, Gary Feldstein [Seq. 009], for an Order pursuant to CPLR 3212, directing the entry of summary judgment in favor of the plaintiff and against the defendants Jack Rounick and Ulysses I & Company, Inc., upon the ground that there are no triable issues of fact, is granted.

On or about September 20, 1992, the plaintiff, Gary Feldstein, entered into a lease agreement with defendant, Jack Rounick, for the rental of the waterfront property located at 57 West End Road in East Hampton, New York.

On May 24, 1993 Feldstein entered into a written contract to purchase said property from Rounick for a sales price of $7,000,000.00. Pursuant to the terms of the contract, Feldstein was credited [illegible] payment of $250,000.00 previously made to Rounick on September 2[?], 1992. He was required to make subsequent payments of $350,000.00 every October 1, commencing in 1993 and terminating in 1996. The seller, Rounick, agreed to transfer good and marketable title to purchaser Feldstein on or before October 1, 1997 in exchange for an additional payment of $1,300,000.00 and a first mortgage to be held by Rounick as mortgagee, as well as agreeing not to further encumber the property or borrow any funds utilizing the subject property as collateral.

The parties entered into a First Amendment to the Contract dated July 4, 1993 which provided for a more rapid repayment schedule. Feldstein and Rounick then entered into a Second Amendment to the Contract dated May 24, 1997, in which Rounick expressly acknowledged Feldstein's previous payments totaling $1,800,000.00, and further "ratified and con-

firmed" the original contract and the First Amendment. Said Second Amendment also postponed the closing date until October 1, 1998, and provided Rounick with monthly payments advanced against the payment that would have been due pursuant to the First Amendment on October 1, 1997. Feldstein was also given the right in the Second Amendment to accelerate the closing date to an earlier point in time upon an accelerated payment of $1,200,000.00.

No evidence has been introduced to demonstrate that Feldstein had failed to make all payments due under the contract and its amendments on a timely basis, through August 25, 1998.

On August 10, 1998 Feldstein entered into a conditional agreement with Peter Morton, whereby Feldstein agreed that he would, under certain conditions, assign to Morton at the closing with Rounick, all of Feldstein's rights to the property, pursuant to the fully disclosed agreement with Rounick. The August 10, 1998 agreement did not constitute an assignment and was expressly conditioned upon Feldstein's ability to obtain Rounick's consent for the transfer of title to Morton. Said agreement in no way prohibited Feldstein from closing directly with Rounick on the property, and Rounick's refusal to consent to the Feldstein-Morton agreement would serve to prevent the effectuation of the anticipated assignment, without effecting the Feldstein-Rounick closing.

By letter dated August 20, 1998 Feldstein informed Rounick of his intentions and asked Rounick to either accept a mutually agreeable amount representing the present discounted value of all future payments to be made under the agreement, or to accelerate, consistent with the terms of the Second Amendment, the closing of title to August 28, 1998. There is no record of a response from Rounick.

On August 25, 1998, Feldstein's attorneys received a letter from Proskauer, Rose LLP, the attorneys representing defendant Ulysses, informing Feldstein that Rounick had sold the subject property to Ulysses on August 24, 1998 and that Feldstein's rights to the property had been extinguished. There is

no evidence to suggest that Feldstein, at any time prior to the sale to Ulysses, as either tenant or prospective purchaser, had been in default of any agreement or had been advised in any way of such proposed sale.

By letter dated September 1, 1998, Feldstein informed both Rounick and Ulysses that the $33,500.00 payment due Rounick under the May 24, 1997 Second Amendment would be placed in escrow with Feldstein's attorneys pending resolution of the respective rights of all parties to the transactions.

By letter dated September 3, 1998, and pursuant to paragraph 2 A (iii) of the Second Amendment, Feldstein advised both Rounick and Ulysses that he wished to accelerate the closing of title to the subject property and that such closing would be held on September 10, 1998.

On September 9, 1998, Feldstein received a letter from Ulysses attorneys stated that, inter alia, Ulysses had "a number of serious questions about [the] authenticity" of the Second Amendment and that because "of the questions that have arisen in this matter" Ulysses would not attend the closing. Subsequently, Ulysses' attorneys viewed the original executed and notarized Second Amendment, and since said inspection, neither defendant has questioned the authenticity of the Second Amendment.

On September 10, 1998 the scheduled closing was held and attended by Feldstein, his attorneys and attorneys for Peter Morton. Neither Rounick, a representative from Ulysses nor their respective attorneys were present at the closing.

It also appears that Ulysses, as part of the transaction with Rounick, placed a $3,000,000.00 purchase money mortgage on the property, in apparent breach of paragraph 8 of the contract between Feldstein and Rounick.

Despite attempts by Ulysses to infer Feldstein's financial inability to actually close title, by noting Feldstein's unwillingness to produce tax returns and remarking on the bankruptcy of a company of which Feldstein was a minority shareholder, Ulysses was unable to contradict Feldstein's submission of the

affidavit of Josef Fischer, managing partner of Decten Fund, L.P., which demonstrated that at the time of closing, Feldstein maintained an account balance in excess of $1,000,000.00, more than the amount due at closing, and that such funds were unencumbered and available for said closing, and all indications are that Feldstein remains ready, willing and able to complete the subject transaction.

The defendants maintain that Feldstein's placement [illegible] September 1, 1998 payment of $33,500.00 in escrow with his attorneys, together with his non-payment of two real estate tax bills totaling $17,084.70, due after the date of defendants' repudiation of the contract, constitute a breach of the contract excusing the defendants' obligation to complete the sale of the property to Feldstein, is unconvincing and unavailing.

There is no evidence to demonstrate, with respect to the aforementioned real estate tax bills not paid by Feldstein, that either defendant have given to Feldstein the original bills, a notice of default or a notice to cure. Neither has evidence been introduced to demonstrate that Feldstein was in default of any of his contractual obligations prior to August 25, 1998. Instead, the documentary evidence, together with the evidence elicited by deposition and other means of disclosure, clearly indicate that it is the defendant Rounick who is in breach of the subject agreement and that the plaintiff Feldstein is entitled to remedy of specific performance.

The evidence submitted, including the pleadings, affidavits in both support and opposition of the various motions and cross-motions, and transcripts of depositions clearly demonstrate that it was defendant Rounick who breached the contract with Feldstein, when the former sold and encumbered the subject property to defendant Ulysses prior to the contractually anticipated closing date with Feldstein. Such breach by Rounick excused Feldstein from further [illegible] performance under the contract between Rounick and Feldstein [illegible] renders the Court unable to grant Rounick's motion for summary judgment dismissing the Complaint (Seq. 007).

With regard to the additional relief sought by Rounick (Seq. 008), said defendant may remove any of his furnishings remaining at the subject premises upon his transfer of the property to Feldstein pursuant to their contract of sale.

Ulysses' motion for summary judgment or dismissal of the Complaint (Seq. 005) is unavailing as the Court finds that none of the actions attributed by Ulysses to Feldstein are sufficient to bar specific performance. Feldstein did not assign his contract rights in the subject property to Morton, rather, Feldstein and Morton executed an agreement to enter into an assignment which was contingent upon Rounick's consent, and expressly conditioned upon the delivery of title from Rounick to Morton. The agreement to assign did not, in any way, preclude Feldstein from closing under the contract with Rounick in accordance with its original terms (See, e.g., Saltair Shinneock, Inc. v. William Yarroll, 56 AD2d 625.)

Feldstein's placement of the $33,500.00 in escrow with his attorney and his non-payment of real estate taxes for the subject property after Rounick's repudiation of the Feldstein-Rounick agreement does not constitute a breach by Feldstein or a default in his obligations under the agreement. Rather, as the party seeking summary judgment, Ulysses has failed to meet his burden of proffering evidence of a default by Feldstein prior to Ulysses' repudiation of the contract (See, Alvarez v. Prospect Hospital, 68 NY2d 320, 324; 508 NYS2d 923, 925; 501 NE2d 572.) Indeed, it is uncontroverted that at all times throughout these proceedings, Feldstein has had the financial wherewithal and has remained ready, willing and able to close title to the subject premises, pursuant to the written contract of sale with Rounick.

With regard to the relief sought by Ulysses (Seq. 006), on its counterclaim for use and occupancy of the subject premises, the Court notes that such relief is the exclusive remedy only where a landlord-tenant relationship is in existence. No evidence of either a written or an oral lease agreement has been provided to the Court, nor has a copy of the Ulysses-Rounick

contract been tendered. Accordingly, the requested relief must be denied.

The totality of the evidence submitted by way of the motions and cross-motions, together with the voluminous deposition transcripts, clearly demonstrate that the plaintiff Feldstein has not breached or defaulted in any of his obligations under the Feldstein-Rounick contract of sale dated May 24, 1993, the First Amendment dated July 4, 1993 or the Second Amendment dated May 24, 1997, and remains ready, willing and able to complete the transaction contemplated by said contract and amendments. Since any breach of said contract was committed by defendant Rounick, plaintiff has demonstrated his entitlement to the remedy of specific performance.

The foregoing shall constitute the judgment and decision of the Court.

Dated: January 31, 2000

/s/ Gerard D'Emilio
GERARD D'EMILIO, J.S.C.